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# JURISPRUDENCE

AND ITS

Relation to the Social Sciences.

BY

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## CHAPTER I.

### INTRODUCTION—THE SOCIAL SCIENCES.

Jurisprudence is the Science of Positive Laws.

It has been observed that laws are by the public considered as something distinct from common life, and the common affairs of society. Yet, to one truly reflecting upon the nature of laws, few subjects ought to be more interesting. The whole fabric of society rests chiefly on the law. The social and political life in which we live, the freedom which we enjoy, all result from the labors of the wise and good in this department of human intelligence. And the Science of Jurisprudence concerns not individuals, but the community. The pleasures of knowledge, the glories of the refined arts, are known to few. Laws are praised or cursed by every fireside. Each nation lives in the cottage as well as in the castle. And unless the beauty of legislation and the excellence of statesmanship dwell in the feelings and condition of the people, government acts like the Epicurean gods, who enjoyed their existence careless of humanity.

The object of a History of Jurisprudence is to exhibit the circumstances which have attended the establishment of existing positive laws. But the exposition of the dead laws which have been super-

seded is inseparably interwoven with that of the living laws which have superseded them. And in this investigation are furnished the great examples for the art of legislation.

Bolingbroke has observed, that to enable one to take a commanding view of the field of law and legislation, there are two principal vantage grounds on which it is necessary to mount—history and metaphysics. The road is smooth and flowery to that vantage ground offered by history. There has been no want of those who have ascended to it, and taken post upon it. To that which belongs to the region of metaphysics, the road is rugged and full of thorns. Few have attempted to gain it; fewer have succeeded in placing themselves in a position whence a view at once clear and extensive could be obtained.

Many of the definitions which I shall adopt may be controverted. They are attempts to give some precision and accuracy to the most difficult department of Social Science. Lord Bacon has said that civil knowledge is conversant about a subject which, above all others, is most immersed in matter the hardest to be reduced to axiom. Aristotle, in the *Politics*, condemns the pursuit of a delusive geometrical accuracy in moral reasoning. Still, the first principles of Jurisprudence are maxims of reason which pervade all human laws, and the observance of which is discovered by experience to be essential to happiness and security.

I have attempted to sketch an outline of the subjects and divisions of Jurisprudence, its limits and province.

The word "law," in its widest sense, is used to designate those natural principles which are incident to and govern all things, animate and inanimate. The entire of physical nature is subject to certain laws—the laws of gravitation, of light, of heat. In the Institutes of Justinian, the term "law" is extended to the instincts of animals, and natural law is therein defined to be that which nature has implanted in all living things. "For this is not proper to men exclusively, but belongs to all animals, whether produced in the earth, in the air, or in the water." Hooker says: "That which doth assign unto each thing the kind, that which doth moderate the force and power, that which doth appoint the form and measure of working, the same we term a law." All nature obeys certain rules, and animals are governed by fixed instincts. The bee and the beaver have built for thousands of years with the same degree of perfection. The celestial bodies have from the period of creation rolled in their orbits, subject to the laws of matter. And the term "law," in its general philosophical sense, is no less applicable to the phenomena of the mind than to the phenomena of matter. The processes of the mind are as uniform as the processes of matter. The mode in which the mind arrives at a conclusion is as

fixed and unalterable as the mode in which an apple falls to the ground. But, in Jurisprudence, the meaning of the word *law* is limited. Law is a rule of civil conduct prescribed and enforced by the State.

A science is a collection of the fundamental truths concerning the same subject-matter, arranged in methodical order.

Philosophy is the explanation of the phenomena of the universe. The objects of philosophy are the discovery of what is true and the practice of what is good.

The explanation of a phenomenon is the reference of the fact to be explained to some known principle.

The properties and motions of matter form the subject of natural philosophy and its subdivisions: thus, the science of astronomy treats of the laws which govern the heavenly bodies; the science of mechanics treats of the laws of weight and motion.

Similarly, mental philosophy treats of the laws which regulate the powers, faculties, and affections of the human mind and its development.

Mental philosophy has been divided into two parts: one treats of man in his individual capacity, the other of man as a member of society. But these parts are divided by an uncertain line, and each encroaches upon the distinct province of the other. The first branch of mental philosophy discusses the individual mind, its intellectual as well as



its moral and active powers, the faculties of the understanding, and those of the will. The second branch of mental philosophy treats of the social development of the human race, and has been termed the Political Science, or the Social Science, or Sociology.

Moral Duties, Exchanges, and Laws are the three subjects of the Social Science.

Ethics, Political Economy, and Jurisprudence form the three divisions of the Social Science.

Notwithstanding considerable progress has been made in some of the physical sciences, especially in astronomy, still, of many common occurrences in nature, the laws are either unknown, or at least are not reduced to that precision to which science ought to aspire.

Prevision is the test of science. Few branches of knowledge as yet can bear that test.

But the possibility of a science which can treat of the laws of society is denied. Even in the nineteenth century our writers maintain the exploded doctrines of the ancient Sophists, and insist that, in the domain of laws and politics, there exist no laws of laws—*leges legum*. Mr. Hallam says: "If it is meant that any systematic science, whether by the name of Jurisprudence or Legislation, can be laid down as to the principles which ought to determine the institutions of all nations, or that, in other words, the laws of each separate community ought

to be regulated by any universal standard in matters not depending upon eternal justice, we must demur to receiving so very disputable a proposition.”<sup>1</sup>

This passage is obscure. If the term “eternal justice” be intended to apply only to those principles of right which can be enforced in the most advanced state of society, then the doctrine is erroneous. Many things are right in one state of society which are wrong in another. Slavery appears to have been suited to some ancient systems. Trial by jury is adapted for a people, honest, fair-dealing, tolerant, and free; it does not produce unmixed good amongst a people divided into fanatical parties, hostile to one another. Trial by jury, although right, cannot be introduced into every country. Slavery, although wrong, cannot be at once abolished.

Similarly, Professor Sedgwick, in his discourse on the Studies in the University of Cambridge, says: “If, in moral reasoning, it be mere mockery to use the language of abstraction, and to build up systems by trains of *a priori* reasoning, it is assuredly not less absurd to affect the forms of inductive proof in political speculation. Every political as well as every moral principle practically involves the determination of the will, and thereby becomes at once

<sup>1</sup> Literature of Europe, Vol. 2, p. 586, 3d Ed.

separated from that class of investigations in which we consider the immutable relations of physical phenomena.”<sup>1</sup> The various causes of obstruction to the progress of the scientific cultivation of laws have been frequently enumerated. Modern jurists have fallen into confusion, vagueness, and obscurity of thought from not having distinguished at the outset ethics or morals from compulsory human law; and they have considered both under one general appellation. They have adopted a kind of *a priori* method of investigation, instead of the inductive method; they have assumed general principles, not warranted by actual observation of facts; they have invented systems of law and government by inductions from careless or imperfect observation, or even by the mere force of imagination, and then adapted the facts of history to these ideal or fictitious systems.

However, it is a great step in the progress of science that the existence of laws is admitted in those operations of nature which form the subject of the physical sciences. But, even where men have the choice of different modes of action, certain consequences follow from adopting one course of action or the other. Nor are such laws observable merely in the conduct of the individual. They are more to be observed in the conduct of multitudes, and in the

rise and fall of great nations, in the records of crimes, and the annals of justice. If an army be marshaled confusedly—if the general have no sympathy with his soldiers—if they do not obey him with promptitude, zeal, and fidelity, there will be but an unsuccessful campaign against the force where order, discipline, and enthusiasm prevail. Faith, labor, honesty, and perseverance have, as they always had, their power to elevate in the scale of humanity the men and nations which adopt them.

At the present period of philosophy, therefore, it is not pretended that the Science of Society is in a very advanced state. It is easier for the astronomer by observation to ascertain the rules of celestial mechanics—it is easier for the geologist to discover the history of the earth's mutations—than for the jurist to trace those circumstances in human affairs which guide men to truth in politics and laws. In all human probability, Sociology will be the last science to be perfected. Of its three component parts, the domain of Ethics alone has been scientifically cultivated by the greatest intellects for a long period in history. But Adam Smith, late in the eighteenth century, gave the first great impulse to the study of Political Economy. Bentham and Savigny, names of very recent memory, have, in the present generation, analyzed and historied Jurisprudence.

Yet, though the Physical Sciences have been

first cultivated with some degree of success, the study of the Social Sciences appears more important with regard to human progress. Most of the processes of nature, the subjects of the Physical Sciences, are beyond the dominion of man; and though he may be affected by their result, still he cannot control them. The earth sweeps through space round the sun, careless of the populations which it bears; the sun revolves round some distant and unknown center of gravitation; the causes of light and heat are mysteries. The earth, with all its millions of the human race, inspired by love, genius, and ambition, is in creation but a whirling speck of dust: and were it at this moment to vanish into nothingness, its loss would be unfelt, unseen by the galaxies which throng the firmament. But most of the subjects of the Social Sciences are within our dominion; and with ourselves alone it rests whether we will use and combine the materials of civilization, or leave those materials unused, and remain in ignorance, poverty, and misery.

It is therefore idle to declare an aversion to Political Science: in so doing, persons state their indifference to the happiness of mankind. It is true that the moral and legal sentiments of mankind are various in different stages of civilization. At the present day, in every country, all opposing parties, Conservatives and Progressists alike, contest the first principles upon which Political Science is

founded; but a similar strife has occurred in the infancy of all sciences. What varied theories have existed in astronomy! The boundaries between the virtue of justice and the other virtues are not yet so distinctly defined as to fix the limits of compulsory law. Time will fix those limits. In legislation, the historical and analytical schools have hitherto been opposed. But it is the business of science to unite them, for actual legislation ought always to be a compromise between history and philosophy. Since all our external actions react upon our fellow-men, we ought to strive to regulate them according to the laws of human association, by the aid of those very Political Sciences which some persons despise. All legitimate interests are in harmony, and the healthful prosperity of one promotes the prosperity of all. The study of the Social Sciences will foster disinterestedness, sympathy, patriotism, enthusiasm for all that is good and great. Even if the study of the Political Sciences were prohibited, their practice could not for a single moment be suspended. There are nations in which the theory of government has never been the subject of reflection or discussion; nevertheless, they are governed. If, then, the Social Sciences be obscure, let us throw light upon them; if they be uncertain, let us endeavor to fix them; if they be speculative, let us establish them upon reason and experience.

In every science the principles are natural and fixed. Very few principles as yet have been discovered in any science. There are natural and fixed principles of legal right and illegal wrong, as there are natural and fixed principles of gravitation. If the laws of exchanges were properly understood, legislative interference would no more attempt to control the rise and fall of prices than the rise and fall of the barometer, or of the tides. If the true principles of Jurisprudence were acted upon, absurd and wicked legislation would disappear.

The study of Jurisprudence is so intimately connected with its kindred branches of Sociology, that it is necessary to compare and define their several limits. The three Social Sciences, Ethics, Political Economy, and Jurisprudence, are so united that it is difficult to treat of their subjects without the equal assistance of the jurist, the economist, and the moral philosopher.

The object of the Science of Jurisprudence is the discovery of the relations which ought to be established by the Positive Law, and the best means to enforce such relations.

The object of Political Economy is the discovery of the laws which regulate the exchangeable value of commodities, and the discovery of the best means to determine the distribution of wealth.

Thus, each science, as to its own subject-matter, strives to attain the true objects of philosophy, the discovery of truth and the practice of good.

Many kindred branches of knowledge assist these studies. Of all the sciences which aid the progress of Sociology, the most important is Statistics.

Statistics is the science of social facts expressed in numerical terms. It is most intimately allied to the three Social Sciences. All have for their end the amelioration of the social state. All guide, by the light of an exalted reason, administrative and political powers. But the Social Sciences proceed with boldness into the most elevated region of speculative systems, whilst Statistics is a science of facts, which in rapid figures enumerates the wants of nations, their daily progress, and all the fortunate or unhappy individualities of their destinies.

The Science of Statistics aids the practice of the Social Sciences in detailing the population of a country, its fertility, its means of communication and defense. This science fixes the numbers of the army which guarantees the independence of the State. It assists in the just imposition of taxes. It tells the quantity and value of the productions of agriculture and manufactures. It traces the progress of the national education, which makes men better by enlightening them. It gives the details of the machinery and cost of justice. It traces the history and causes of disease, and points out the true course for sanitary reform. It illustrates, by novel and exact truths, a crowd of objects which arise from day to day, agitate public opinion, and exhibit problems to be solved by the Social Science.



Working steadfastly at these subjects, wise men have developed the Social Sciences, and the human race has progressed in civilization. Civilization is that condition of social life possessed by a moral, educated, and wealthy community, enjoying public security and liberty under the protection of law. The first requisite of society is security. When property is not secure from foreign ambition or civil commotion, or from crime, accumulation cannot proceed, nor can wealth remain in that degree which is necessary to provide persons with the luxuries and decencies of civilized life. No one would till the earth unless under the certainty that a reasonable share of the harvest would be enjoyed by himself. No one would voluntarily live and work in that country which is continually ravaged by foreign armies. Public liberty is as essential an ingredient of civilization as public security or order. By public liberty I mean freedom of discussion, freedom of action, including absolute personal liberty, a free press, and a representative government. But wherever there is tolerable security, even without any high degree of liberty, morality, or knowledge, wealth may still accumulate. Still, morality, or the sense of right, is the essential ingredient of a high order of civilization, and exercises the most remarkable influence on the prosperity of nations, and their success in art and war. Facility of communication is also an important part of advanced civilization.

A country cannot be considered united, nor can it possess the stability of centralized government, unless there be easy and ready means of communicating from the capital to the different parts of the empire. The Romans were well aware of this when they constructed the roads which remain to the present day memorials of the Roman greatness. But the recent triumphs of mechanical science have surpassed the rude efforts of ancient times; and the railway, the steamboat, and the electric telegraph are among the most important agents in the diffusion of knowledge and the maintenance of freedom. In nothing, however, have the civilized nations of modern times more surpassed the civilization of the ancients than in the knowledge and education of the people. Hence, it is reasonable to entertain a hope that our present civilizations will not be lost, like those of Egypt, Greece, or Rome. The first literary State was Athens, possessed of the little territory of Attica, containing a population inferior to that of some English and Irish counties. Although books then were enormously dear—and it is recorded of Plato that he once paid £300 for an indifferent volume—still there was in Athens a popular education of a high order. Thus, Homer and the Rhapsodists publicly recited their poems; the plays of Æschylus and Sophocles were performed in the presence of 30,000 spectators; the history of Herodotus was read at the Olympic games; the

odes of Pindar were sung at Delphi ; Æschines and Demosthenes addressed the people in the assembly ; the glorious statues and temples of the Ionian race were another and a splendid part of their education. In Rome, there was no popular literature. The military aristocracy encouraged the people in their warlike spirit by wild-beast shows and gladiatorial combats. The early Romans organized government and war, but left art for other races. The northern conquerors of the Roman Empire despised learning. The great majority of their kings, counts, and dukes were unable to write their names. Their signature was a seal, *signum*, impressed on their deeds. In effect, the improvement of the mechanical arts, the invention of printing, and the general use of paper first rendered a cheap literature and popular education possible. There is a great difference between the first Gazette published at Venice, and the *Times* of the latter half of the nineteenth century. The first Gazette contained fragments of doubtful news ; now, more than by anything else in England, the people are educated by the newspapers, that with such industry collect, and with such rapidity disperse, information every morning to the working intelligence of the empire. The education of the people is increasing every day among all the nations most advanced in civilization. It was even recently the fashion to discuss whether education ought to be extended to the people ; but, whilst

learned men discussed these things, the laboring classes have become comparatively educated, and are an element in society. And, by the aid of printing and the diffusion of education, one clever man can now speak to tens of thousands more than Demosthenes ever electrified in the popular assembly.

Such are the present prospects of civilization. It is plain that if the civilized nations of Europe and America were left to themselves, untrammled by the feudal forms, and freed from despotism, whether monarchical or democratic, a long career of progress would be before us. But the same cause which has so often checked civilization for centuries may again devastate Europe. War is the greatest foe of progress. War has often annihilated the most magnificent civilizations. Foreign aggression ruined Egypt. A foreign war destroyed Carthage; and the northern coast of Africa has never recovered from the devastations committed two thousand years ago by the Roman soldiers. Rome, by war, destroyed the Grecian civilization. The northern barbarians annihilated the Roman Empire. The Mahometans conquered the civilization which, under the Greek emperors, a second time arose on the banks of the Hellespont. In every country the ruins of lost civilizations appear, destroyed by war.

The project of perpetual peace was prominently brought forward by Kant toward the close of the eighteenth century. Some of the articles of his the-

oretical treaty of a perpetual peace are essential to study. One of the most important is the disbanding of those vast armies which now consume the wealth of the most powerful States. Standing armies—*miles perpetuus*—ought to disappear entirely with time. For these, appearing always ready for the combat, incessantly threaten other powers with war, and incite States to surpass one another in the number of their troops. This rivalry is a source of expense, which ends by rendering peace more burdensome than a short war. National debts ought not to be contracted for the purpose of interests external to the State. This system of credit is a treasure always ready for war. The only security for the preservation of universal peace is in the freedom of the constitution of each State. Where citizens are free, and have in their own hands the government, they hesitate to declare against themselves the calamities of war; but where the subjects are not citizens, the sovereign and the governing classes, having little to fear for their personal comforts, may declare war upon the most frivolous reasons.

The abolition of standing armies, the restriction of national debts, and the independence of representative constitutions are considered by Kant to be the only guarantees of peace. But these are most doubtful topics. Republics have been the fiercest aggressors in history. And the standing armies

and police of Europe are necessary, as well against the foreign enemy as against the internal sedition which, like Communism in France, attacks order, religion, and property.

## CHAPTER II.

### ETHICS IN RELATION TO JURISPRUDENCE.

Ethics is the Science of Moral Duties.

The purpose of the Physical Sciences throughout all their provinces is to answer the question, "What is?" They consist only of facts, arranged according to their likeness, and expressed by general names given to every class of similar facts. The purpose of the Moral Sciences is to answer both the questions, "What is?" and "What ought to be?" They aim at ascertaining the rules which ought to govern voluntary action, and to which those habitual dispositions of mind which are the source of voluntary action ought to be adapted.

The possibility of erecting Ethics into a science can be consistently disputed by those only who question the veracity of that consciousness which immediately shows to us the existence and operation of a moral faculty.

The arguments against the existence of a moral faculty are generally founded upon the gross insensibility to moral distinctions exhibited by uneducated children, or savage nations; or upon instances of persons who, from various causes, have counted those things right which we deem wrong, or es-

teemed actions as praiseworthy which we regard with abhorrence. But such exceptional and anomalous cases are nothing to the purpose. When we are told of the absurdities and self-contradictions believed, or at least professed, by whole nations as certain truths—when we are reminded that children and uneducated peasants do not readily assent at first hearing to the very axioms of science—we are not apt to be greatly disconcerted by such cavils against the existence of reason. The case is similar with respect to imperfect or diseased manifestations of our moral nature. Moral blindness, if it really exist at all, is a phenomenon far too rare to be taken into account in the psychology of man. The goitre is indeed a melancholy instance of the evil results of a depressing physical condition; the Chinese woman's foot displays remarkably the power of bad training; but the anatomist of healthy humanity does not describe goitres and club-feet as our normal condition. Hume, who industriously traversed the history of our race to collect all the instances of aberration which have resulted from neglect or imperfect study of the moral consciousness, is constrained to conclude that the principles upon which men reason in morals are always the same, though their conclusions are often very different; and Dugald Stewart observes, no less beautifully than ingeniously, that the histories of human imbecility are, in truth, the strongest testimonies



which can be produced to prove how wonderful is the influence of the fundamental principles of morality over the belief, when they are able to sanctify in the apprehension of mankind every extravagant opinion which early education has taught us to associate with them. Such are their opinions. Though the obscure character of psychological law, the influence of predominating passions, or the capricious action of human volition may interfere with the inferential process in morals—and though the peculiar difficulties by which the moral philosopher is embarrassed, arising from the unavoidable use of a terminology impressed with the laxity of colloquial language, may render futile the attempt to compete with the geometrician in the simplicity and lucidity of his deductions—yet his process is identical with the geometrical method. Could we, indeed, shut out human volition, and the action of disturbing fancies, mankind would no more differ about the conclusions to be drawn from the primary elements of Ethics than about the deductions from geometrical postulates and definitions. Nor are the Moral Sciences alone exposed to the uncertainty arising from disturbing influences. There are elements in meteorology and in the laws of the tides which are unaccountable, and for which allowance must be made in the calculations which compute their effects in any given instance. We are not, then, to relinquish, on account of these disturbing influences and great

obstacles, the erection of an imposing group of Moral Sciences on grounds quite as solid as those which refer to the material world. We find a scientific basis furnished to Ethics in the laws of our moral constitution; their nature, value, and the truths guaranteed by them can be determined only by inductive investigation—the common method of “The Athenian Verulam and the British Plato.”

It is quite evident that Bacon meant his method to be applicable to psychology and morals as well as to physics. In the one branch of philosophy, as in the other, there should be an orderly observation of facts, accompanied by analysis, or, as he expresses it, the necessary exclusions of things indifferent. This should be followed by a process of generalization, in which we seize on the points of agreement. The only essential difference between the two lies in this, that in the one we take the senses, and in the other consciousness, as our informant.

The only question of any difficulty respecting an inductive treatment of morals, seems to be this: does such a treatment mean that there are no *a priori* or intuitive principles of moral guidance, which, instead of deriving their authority from experience, are fitted and intended to sanction experience? Does not such a procedure expose us to the danger of substituting empirical generalizations and accidental associations for necessary truths and eternal principles?—of confounding, like the Athenian sophists,

an average morality with an absolute standard of rectitude?

This objection is based on a misapprehension of the scientific process. To identify ethical truth with vulgar credence, or to adjust it to the fluctuating standard which the popular market supplies in every age to the demands of each succeeding generation, would be fatal to the very idea of a real moral law. A series of facts brought forward to show the general acknowledgment among men of a moral truth, must be carefully distinguished from an induction of a physical law from facts observed. The principles operate *a priori*, and independently of experience; they cannot become known to us, or be employed as philosophic principles, till we have determined their nature, rules, and limits by methodized observation. The distinction between moral good and evil—the obligation to shun the evil and do the good—are laws which, like the laws of logic, man discovers in his own nature, and which have their origin in himself, as they have their application in his actual life. Moral laws are put into a man's soul or mind as into a treasury or repository—some in his very nature, some in after actions, by education and positive sanction. The moralist refers for judgment on the necessary truths he enounces, not to voluminous statistics, however undeniably useful such records may be as a definite expression of certain facts in our social economy, and entitled as they

are to an intermediate place between morals and politics; he bids the student descend into his own consciousness—the depths of his own personality—and observe what he finds there.

Mental laws thus inductively determined are henceforward to be regarded as primary principles, and are open at once to the sweeping range of direct deduction. And again, experience has its part, in which there is an immensity to be done, not in the way of invading the domain of the exact science, but in that of extending our knowledge of the facts to which it is to be applied. Where the science of intuitive morals ends, there the science of the experimentalist meets it; and, by a process which modern logicians have named *traduction*, we pass from one order of reasoning to the other, and complete a Science of Ethics practically applicable to every detail of life. And thus, a method, constructed after the aphorism of Bacon, secures to the experimental as well as to the purely rational element its own approximate value, assigns to each its own place, and shows how the two are inseparably united, and how they mutually confirm and illustrate each other.

The preceding general views may be illustrated by the following passage from Kant: “It is more particularly in the region of morals that Plato discovers his ideas. Moral truth rests upon liberty, and liberty is under the government of laws which

spring from the reason itself. Whoever would rest the idea of virtue upon experience, and establish as a model that which can scarcely serve as an example in any important practical application, would render virtue altogether uncertain, make it dependent upon time and circumstances, and render the formation of any rules impossible. Every one, on the contrary, can see that if any person were held up to him as a model of virtue, it is only in himself that the true type exists, to which the proposed model might be compared, and, consequently, appreciated. Now, this type is the idea of virtue; the objects of experience may, indeed, serve as examples to show that what the reason demands is, up to a certain point, possible in practice; but the archetype itself is not there. Because a man never acts in accordance with the pure idea he has of virtue, it does not follow that the idea itself is a mere chimera; for it is only by means of this idea that moral judgments are formed at all; it is, consequently, the foundation of moral perfection, so far at least as this is possible, considering the obstacles which human nature presents, which are, however, indeterminate. The Republic of Plato has become proverbial as the expression of an imaginary perfection; and Brucker ridicules the notion that a prince could never govern well unless penetrated by the theory of ideas. But, instead of throwing aside Plato's thought as useless, under the

pretext that it is incapable of realization, would it not be better to attempt a development of it, and by renewed efforts draw it from the obscurity in which that excellent genius has left it? The obstacles arise less, perhaps, from the inevitable evils attached to human nature than from a neglect of these veritable ideas in legislation. There can be nothing more unworthy of a philosopher than to appeal to an experience which is acknowledged to be in contradiction to these ideas ; for what would have been the experience itself if the institutions in question had been established under happier auspices, conformably to ideas, and if, instead, other ideas, gross and rude, just because they are derived from experience, had not rendered every good design useless? In all that has reference to the principles of morals and legislation, where ideas alone render experience possible, Plato possesses a merit that is peculiar to him, and which we are prevented from recognizing only because we judge according to empirical rules, whose value as principles is as nothing compared with that of ideas. In reference to external nature, experience may, indeed, furnish rules, since, in this case, it is the source of truth ; but in reference to morals, experience is the mother of illusion ; and it is altogether error to reason from that which is done, or attempt to limit it by laws which have especial reference to that which ought to be done."

The historical method of inquiry has been recom-

mended by some, as by Schleiermacher, with whom Ethics is an investigation of human nature in its forms and tendencies developing itself in history. It must be conceded that history supplies to Ethics its most valuable illustrations ; but as human action is always presented in history as a complex web, in which good and evil are mixed together, it is needful to have a test to determine which is the one and which the other. We are thus brought back to the inductive investigation of man's moral constitution as the only method of constructing a scientific Ethics in reference to Jurisprudence.

A most successful illustration of this inductive treatment of moral phenomena will be found in the ethical writings of Butler: "There are two ways," writes Butler, "in which the subject of morals may be treated. One begins from inquiring into the abstract relations of things ; the other from a matter of fact, namely, what the particular nature of man is, its several parts, their economy or constitution ; from whence it proceeds to determine what course of life it is which is correspondent to this whole nature. In the former method the conclusion is expressed thus—that vice is contrary to the nature and reason of things ; in the latter, that it is a violation or breaking in upon our own nature." Of the former method, the system of Clarke—that virtue is a conformity with the relations of things ; and that of Wollaston—that virtue con-

sisted in acting according to truth, are the most eminent examples. These systems, which were recommended by the intellectual spirit of the age in which they were produced, when the splendid discoveries of Descartes, of Leibnitz, and of Newton had so dazzled the mind of Europe, have now become obsolete. The latter procedure was universally employed by the ancient moralists; and Butler, systematically applying it, "occupying the unassailable ground of an appeal to consciousness," has established, by reasons superfluously conclusive, not merely the existence, but also the authoritative character and the implicit sanction of the moral law. It is as invested with these majestic attributes of eternity, immutability, and universal authority, that the greatest masters of philosophy and eloquence, both in ancient and modern times, have loved to contemplate and depict the moral faculty. Thus, Cicero says: Right reason is itself a law congenial to the feelings of nature, diffused among all men, uniform, eternal, calling us imperiously to our duty, and peremptorily prohibiting every violation of it. Nor does it speak one language at Rome and another at Athens, varying from place to place, or from time to time; but it addresses itself to all nations and to all ages, deriving its authority from the common Sovereign of the universe, and carrying home its sanctions to every breast by the inevitable punishment which it inflicts on transgressors. Seneca



says : There is a holy spirit throned within us, of our good and evil deeds the Guardian and the Observer. As he is treated by us, even so he treats us. Fénelon says : *Le Maître intérieur et universel dit toujours et partout les mêmes vérités.* Under the same aspect the moral law is presented by Kant, when he calls it the Categorical Imperative, whose absolute rule is, Act according to a maxim which would admit of being regarded as a general law for all acting beings. And Lord Brougham says : There is a law above all the enactment of human codes—the same throughout the world—the same in all times—it is the law written by the finger of God upon the heart of man.

## CHAPTER III.

### POLITICAL ECONOMY IN RELATION TO JURISPRUDENCE.

Political Economy is the Science of Exchanges.

The bountiful earth, under the varying influences of soil and climate, produces different things useful and agreeable to man. In tropical climates, nature turns every field into a garden: there trees of beautiful form bear rich fruits; there grow the shrubs from which we obtain our spices, and variegated flowers bloom in wanton profusion. The organic richness and abundant fertility belonging to such districts enable them to produce the luxuries of civilized life. Countries more temperate afford vines and wheat. Some places abound in iron and coal; others in gold and silver. All civilized nations require to exchange some of their own productions for those of others, and upon such exchanges does the very existence of civilized life depend.

Between one country and another obstacles exist—seas, mountains, rivers, forests. These things throw difficulties in the way of transit; and to facilitate the operations of commerce, the ingenuity of man invents speedy and safe modes of conveyance. Canals are made, harbors widened, rivers deepened,

navigation improved. Rapid steamers triumph against the winds; railways tunnel the Alps and bridge the Mississippi and the Ganges. Political Economy shows how inconsistent it is that States should undergo the greatest expense, by building magnificent railways to facilitate intercourse, and at the same time should check intercourse by commercial restrictions and taxes which artificially raise prices.

All the phenomena which occur in the free interchanges of the productions of one place for those of another—the rise and fall of prices, and the reasons for the respective values of commodities, all the questions connected with capital and labor, everything relating to exchanges—it is the province of Political Economy to investigate. No subjects can be more important; and the investigation of them upon sound principles, now proceeding in most of the civilized nations of Europe, must eventually produce important results on the commerce, the prosperity, the progress of the world.

At first, when this science began to be extensively cultivated, objections were made to it, on the grounds that wealth is not a proper subject for our study, for with it increase also corruption and vice. Persons have derived ideas of this kind from the early study of the Greek and Roman writers; the minds of classical students retain through life the ideas of Cincinnatus nobly poor, and the black broth upon

which Leonidas and his Spartans lived. The Roman writers praised sumptuary laws, and declaimed with all the strength of their powerful language against the degeneracy of their fellow-citizens from the old Republican times, ere they knew the refined arts of Greece, or enjoyed the plundered riches of the East.

But no fatal union necessarily exists between national wealth and national corruption. Greece at the time of her greatest material prosperity flourished most in eloquence, in arts, and arms. The Netherlands, in the time of Charles V, were the most industrious and, for their amount of territory, the wealthiest nation in the world—they exhibited no want of devoted heroism, no want of fiery independence. And although England, like ancient Tyre, has her merchants who are princes, her traffickers who are the honorable of the earth, she still sits very glorious in the middle of the seas, and enriches the kings of the earth with the multitude of her riches and her merchandise. We may banish, then, the idea that the abundant returns of industry, the fruits of genius, the boundless extent of commerce, the exuberance of wealth, and the cultivation of the liberal arts are enervating to the national spirit or dangerous to the national liberty. Liberty depends upon the structure of the government, the administration of justice, and the intelligence of the people. It has little to do with wealth, or poverty, or soil, or climate.

The Science of Political Economy is of recent origin.

In the first stages of society, wealth, in the present popular meaning, can scarcely be said to exist. The wandering tribes of savages live by hunting and fishing; their habitations are formed of the bark of trees; their wealth consists of the skins which they wear, their weapons of the chase, and their canoes.

In the progress of society, the next step to this is the pastoral state, in which tribes of men, united under the patriarchal system of government, have flocks, and live upon their produce.

From this, the transition to the agricultural state is easy, in which there are more opportunities for accumulating wealth, and in which civilization rapidly progresses. Next in history arise the civilized nations of antiquity of which we have authentic record.

In Egypt and many other Oriental nations there was great wealth; but they labored under oppressive despotisms. The bulk of the population was in slavery. The government, owning all the land of the country, was enabled to compel the cultivators to labor, and then to deprive them of the produce. The Pyramids of Egypt have often been mentioned with wonder, as evidences of the greatness of that civilization which was able to leave such great memorials. To me, on the other hand, reflecting

that they were raised by forced unpaid labor of thousands of miserable beings perishing at the task, they have always seemed to exhibit only proofs of the senseless vanity of tyrants, who dragged so many of their subjects together, and forced them unpaid to raise useless heaps of stones, when those unhappy persons would have been better employed in building comfortable though perishable houses for themselves, and living there with their families.

In Egypt, the sacerdotal caste alone attended to intellectual affairs, whilst the rest of the population was sunk in ignorance. The entire system of castes was strictly enforced. These castes still prevail throughout the East; and the system this moment may be seen in full vigor in parts of India, where Brahmins and their children's children must be priests forever—where the descendants of soldiers must always be soldiers—where none of the natives who live strictly according to the tenets of their religion, can leave the trade or business which their fathers followed.

In modern civilized societies there are many examples of men of humble birth raising themselves to the highest position and the greatest fortunes. Under the ancient tyrannies it was impossible for the phenomena attending the free competition of capital and labor to arise; it was impossible for the principles of taxation to be discussed, since taxes

were nothing but plunder taken by the powerful from the humble.

In these old times the universal reign of rapine prevented the study of the Social Sciences from flourishing ; notwithstanding that, some nations successfully cultivated literature and the arts. Things now only practiced by the outcasts were then the pursuits of the leaders of society. Thus, Homer introduces Nestor asking Telemachus whether he and his friends were pirates or merchants :

“ Say, what the cause—why, traversing the main,  
Steer you from port to port in quest of gain ?  
Or to and fro, like roving pirates stray,  
Who, injuring others, cast their lives away ? ”

—*Odyssey, Book III.*

The writer evidently did not consider that profession dishonorable which now is punished by the rope, and to destroy which civilized nations now offer head-money for slain pirates.

Athens, in the time of Pericles, flourished in wealth ; her poets and orators hold still a foremost place amongst the intellects of the world ; her architecture is still a model for us ; her art is still contemplated by all succeeding time with admiring despair. Rome, under the later Republic, and in the time of the Emperors, accumulated such wealth as London now can scarcely rival, and in taste and art surpassed the Paris of the Napoleons. Why, then, did not those countries cultivate the science which

treats of the operations that bring the produce of one climate to another, and enable the inhabitants of any district enjoying a fair share of wealth to possess the luxuries of the most remote zones, without the discomforts attending their production? One reason was, the utter contempt with which trade was regarded by the classic times. The citizens of the ancient States, even those enjoying the highest degree of freedom, all despised trade. Those branches of commercial and manufacturing industry which have raised our modern civilization to so great a height, and without which it would at once disappear, were scorned by the warlike citizens of Greece and Rome. Plato excluded tradesmen from his Republic. Cicero, although in most respects so far in advance of his age, thought commerce only not very despicable—" *haud admodum vituperanda.*" He says also: "I do not wish the same people to be the ruler and the carrier of the world"—" *Nolo eundem populum imperatorem, et portitorem esse terrarum.*" Yet it has been the boast of Venice, Holland, and England, in succession, to be the carrier of the world. The Romans prohibited commerce to persons of birth, rank, and fortune, and no senator was allowed a vessel larger than a boat sufficient to carry his wine, corn, and fruits. The military aristocracy of Rome, without trade or commerce, sought wealth in the only manner which can take the place of production—plunder. The



wealth of Rome was plunder taken openly from the countries successively overrun by the victorious Roman armies; the principal taxes by which in latter times the Roman government subsisted were tributes drawn from conquered provinces.

The very sense in which the word *tributum* came to be used shows how unfair was this—one of the earliest taxes in Rome. It was called *tributum*, being paid by the thirty plebeian tribes instituted, as has been supposed, by Servius Tullius. It derived its subsequent meaning from being a partial tax, not paid by the patricians, and a badge of servitude upon the plebeians. I am aware that it is a moot-point amongst historians whether these tribes included the patricians or not; but I consider that the sense in which the word *tributum* came to be used finally is upon this question decisive.

The wealth of Rome was principally plunder drawn from conquered countries. As each partly civilized nation in turn yielded to the terror of the Roman armies, its wealth, accumulated for centuries, was transferred to Rome and spent in a season. While nations thus afforded plunder, Italy flourished in wealth, and was covered with the most magnificent public and private edifices. But when no more new countries could be overcome, and when the tributes could no longer be exacted from the inhabitants of the provinces, the resources of Italy were not sufficient to keep those magnificent edifices

from mouldering to decay. The ancient world had within it the fatal principles of decay—the despotism of the government, the tyranny of the governing races, the slavery and ignorance of the masses of the people. The old civilization fell to pieces upon the invasion of the hardy barbarians of the north, and the Dark Ages for a time covered Europe with a cloud.

When learning began again to be cultivated, and when the European universities were founded, the old prejudice against trade and commerce still survived. The feudal system flourished. The principle of the feudal system was, that a dominant race tyrannized over a subjected one. The feudal lords extorted from the serfs their property, and insisted on their labor without paying them for it. No man could possess the absolute property of the land. The greatest contempt was manifested for trade. Warriors, in the early ages, contemned the rights of property in all unable to protect themselves by arms. No nobleman or gentleman in the feudal times would sully himself by embracing any profession, except that of arms—or the church. As a proof of the great contempt for trade which once existed in England, now the first commercial nation upon the earth, the most lucrative and flourishing branches of trade were there permitted to fall into the hands of despised strangers—the Jews and Lombards. The Jews invented bills of exchange, without which, or

some similar documents, the vast mercantile operations now based upon credit could not be conducted. The Lombards invented shipping insurances. In this state of society none of the phenomena could prominently appear which arise from the free distribution of property, and from the unrestrained competition of capital and labor. None would consider about the cheapest and best mode of taxation, whilst taxes were the property of governing races, who consumed them all for their own benefit, and were careless about the welfare of the producers. War was then the great business of nations, and the attention of government in matters of taxation was directed merely to the most effectual means of raising the supplies to meet the expenses of continual warfare. The best statesman was he who raised most taxes with least trouble from the oppressed common people.

The great discoveries of the fifteenth century began to destroy feudalism. The invention of gunpowder caused the castles and armor of the barons to be useless, by means of which they had been enabled so long to prevent and defy any general law of the realm, and to live upon the plunder of the poor. It was found that a regiment of laborers, disciplined for six months, and armed with the weapons introduced by this wonderful discovery, were superior in the battle-field to the bravest knights, mounted on splendid horses, and clad in costly armor. But

the new weapons were expensive ; there, again, the wealth of the towns was of more use than the chivalry of the castles. The great invention of printing diffused knowledge amongst all. The great geographical discoveries gave a new impetus to commerce, which, from its wealth and extended operations, began no longer to be despised. Slavery by degrees vanished from the whole of Western Europe. Thus, with the decline of the feudal system, arose that commercial and manufacturing spirit which is now beginning to be one of the great moving powers of the world.

Once, therefore, that the settled conditions of modern society began to arise in Western Europe, the serfs, emancipated from the feudal system, were enabled to dispose of their labor at the price which they considered sufficiently remunerative for them ; merchants, under the protection of the law, no longer feared that their property would be taken from them at the will of some baron ; wealth rapidly accumulated, and some men, instead of working with their own capital, began to live upon the profits of their capital lent to others. In consequence, all the nice and complicated questions connected with capital, labor, wages, and taxation began to attract the attention of learned men, and from their studies and writings upon these important subjects has arisen the modern science of Political Economy. The origin of this science is cotemporaneous with the spread

of modern civilization, the increase of commerce, the rise of public liberty.

And briefly reviewing the history of Western Europe, we may see that the march of civilization has been steady and progressive. First, the serfs are emancipated, then trade becomes honorable, and from these conditions, combined with some others, has arisen the great middle class, displaying the highest social activity, and cultivating the greatest spirit of industry ever witnessed in the world. Having accomplished so much, the spirit of progress now directs its efforts to solve the social difficulties of society; and in this, one of its chief aids is the Science of Political Economy.

Some have despaired of continual progress, and assuredly all over the earth we behold the ruins of lost civilizations. In Central America, amidst forests a thousand years of age, the traveler beholds ruins of statues and temples that rival Athenian art and Egyptian architecture. They lie, broken and defaced, memorials of great and civilized nations, whose very names ages ago perished from human memory. Babylon, Nineveh, Carthage, once were great cities, and now are either heaps of ruins or effaced from the earth. Still, we may anticipate that progress may have a long career. Sometimes for centuries it has been interrupted, yet since the dawn of history there is evidence of its continuance. We behold upon the earth places like the impassable

morasses of the Amazon, breathing forth devastating epidemics, and affording to the few creatures in human form that linger there, the means of dragging on but a dull and joyless existence, without usefulness or dignity. Comparatively recent history informs us that when the Athenian civilization flourished, the greater part of Europe, and now its most flourishing and civilized part, bore the same character. When Pericles lived his glorious existence, those countries which, under the names of France and Germany, are covered with rich corn-fields and beautiful vineyards, and have produced so many great and good men, were disfigured with rocks and marshes, and were inhabited by uncivilized men not very superior to the present New Zealanders. The rivers, which then formed noisome swamps, have been taught to keep their channels, and are covered with steamers; the rocks are built into libraries and cathedrals, and the descendants of the savages who dwelt there have been brought under the dominion of law, and into the habits of peaceful life. So also, in the North and South Americas, Australia, and the islands of the Pacific and Southern Oceans, savage life is everywhere being replaced by civilization.

In the popular liberty which has enabled so many men of humble birth in modern times to raise themselves to the honorable positions which they have

adorned, we see the best proofs of the high character of our modern civilization. In the development of society, civilized nations have arrived at that stage where commerce is free, where industry is honored. The fruits of labor are protected by the law, its exertions are respected.

The study of the Social Sciences has aided to produce these sentiments, beginning to pervade the heart of modern society. I have always considered that the study of the Social Sciences, such as Jurisprudence and Political Economy, should form a part of the general education of all, the poorest as well as the richest in the land.

The sciences may be placed in two divisions. Some of necessity need to be known only to those who practice them professionally. We all can enjoy the fullest benefit of the mechanical sciences, notwithstanding our ignorance of them. Few are acquainted with the mechanism of the steam-engine, yet millions enjoy the benefits of railway traveling. But sciences, like Morality, Jurisprudence, Medicine, and Political Economy, derive their efficacy, not from the knowledge concentrated in particular professions, but from the general correct knowledge of them diffused through the public; and these sciences have this striking peculiarity, that no one confesses his absolute ignorance of them. Every one every day practices Morality, Jurisprudence, Medicine, and Po-

litical Economy, let them be good or bad—and they are often very bad. Hence arises the importance of general education upon these subjects. And as regards Political Economy, I may say there are no subjects more interesting than those about which this science is conversant. They are those which concern every individual in the community; they are those upon which, in a very great measure, individual and national prosperity depend. There is no one who does not buy and sell, who does not pay taxes, who does not employ labor or is employed. And there cannot be upon earth a study of more extended dignity and usefulness, more becoming to philanthropy and patriotism, than the requisite and practical reform of the social institutions of the country—the solution of the social difficulties of the day. It is right to cultivate this social knowledge. By the study of these liberal sciences we shall the more assist the diffusion of the sentiments now spreading throughout the world, and by means of which all enlightened men regard the human race, without distinction, as one family aspiring to one common aim—the development of the faculties with which they have been endowed. The Social Sciences are of no one country, they belong to the entire world. Those who cultivate them, though separated by distance and by language, yet understand one another. Fellow-countrymen in thought, they form one vast intellectual society of citizens of the world, pursu-



ing the same end, the discovery of universal truth—animated by one feeling, the patriotism of civilization.

## CHAPTER IV.

## JURISPRUDENCE.

The term Jurisprudence has been used in very different senses. Originally, it meant the science of right. Afterward, it was used to mean knowledge of the principles of law, or skill in its practice. In the Institutes of Justinian, Jurisprudence is defined to be the knowledge of what is just and unjust. Upon the revival of learning in Europe, in the sixteenth century, Jurisprudence was used to signify knowledge of the Roman law. The term has also been used, in a sense borrowed from the French, to imply a collection of the principles belonging to particular branches of law—thus, Equity Jurisprudence, Maritime Jurisprudence. The term has also been used to signify the whole body of the law of a State—thus, the Jurisprudence of England.

The philological meanings of legal terms best illustrate legal history. There are three phases in the development of law—the religious, technical, and scientific. In the origin of society, every disputed question in law is referred to the decision of God. In all languages the legal terms of pleading causes originally imply the idea of prayer. Trials are by ordeal and by battle amongst all nations in an early state of civilization.

In the second phase of law, nations, by means of pre-appointed evidence and forms of a minute and cumulative nature, endeavor to attain certainty. Seven Roman citizens were originally necessary to attest a Roman will. Under the English law, twelve jurors must unanimously find a prisoner guilty before he can receive punishment. Justice, under such a system, becomes minute and technical. The judges often knowingly do what is unjust in carrying out the letter of the law. The maxim of this second phase is, "Let justice be done though the heavens should fall"—*fiat justitia ruat cælum*. Justice and the corresponding terms in this phase of law mean equality of division in all languages.

Finally, men begin to perceive that there are natural principles of right and wrong; and, in the third phase of law, endeavor to attain truth and justice by the aid of reason and experience.

Whilst the first and second phases prevail amongst a nation, law cannot be scientifically cultivated. In the third phase, the possibility is admitted of arriving at a complete science of law or science of right. In other words, the possibility is admitted of collecting and arranging in methodical order the fundamental principles which explain the origin of laws and their development toward perfection. Some term is necessary to denote the science of law. Jurisprudence has been the word adopted. No science can possibly be developed without method, nomen-

clature, and classification. "*Nomina si pereant, perit et cognitio rerum.*" Method facilitates comprehension, abridges labor, assists the memory, and trains the intellect to accurate judgment. In every species of knowledge, disorder in language is at once the effect and the cause of ignorance and error. Nomenclature can only be perfected in proportion as truth is discovered. The classification of laws has never yet been adopted upon the grand scale demanded by Jurisprudence. If a system of law were correctly framed, and if codes of laws were drafted on one true principle by all civilized nations, the language of each race would serve as a glossary by which all systems of Positive Law might be explained; whilst the matter in each code would afford a test and standard by which all might be tried. Thus classified and illustrated, the practice of every nation might be a lesson to every other, and mankind might carry on a mutual intercourse of experience and improvements as easily in law as in every other domain of art and science.

By law is here understood Positive Law—that is, the law existing by position, or the law of human enactment. Jurisprudence is the Science of Positive Laws, and, as such, is the theory of those duties which are capable of being enforced by the public authority. Jurisprudence, so treated, may take its place as one of those inductive sciences in which, by the observation of facts and the use of reason,

systems of doctrine have been established which are universally received as truths among thoughtful men.

But Jurisprudence, in its investigation of the origin, principles, and développement of law, obviously furnishes rules which teach men to acknowledge and select good laws, to shun evil laws, and to practice the existing laws and apply them skilfully. Hence, Jurisprudence is not only the Science of Positive Laws, but is also the art of legislation and the practice of advocacy. A jurist may state principles of law in his study, enact laws in the senate, or advocate rights in the forum.

A science is a collection of truths; an art is a collection of rules for conduct.

The end of science is truth. The end of art is work.

Since science is conversant about speculative knowledge only, and art is the application of knowledge to practice, Jurisprudence, when applied to practice, whether in making of laws as in legislation, or in the actual working of the law as in advocacy, is an art; but Jurisprudence, when confined to the theory of law, is strictly a science.

The same term may be strictly applied to both the science and its corresponding art, as logic is not only the science of thought, but is also the art of reasoning. So that I may give an example taken from the practice of the law—conveyancing is the

science and also the art of alienation. If, by an investigation of the laws of property, we elicit and systematize the principles which govern its disposition, we are then forming the science. If we apply this knowledge in the alienation of property, we are skillful in the art.

The art may exist without the corresponding science having arrived at any degree of cultivation. If the knowledge applied to practice be merely accumulated experience, it is empirical; but if it be illustrated by history and philosophy, and brought under general principles, it becomes a science. Thus, Sir Edward Coke was an empirical lawyer; his writings are a chaos of ill-digested learning. Judge Story was a scientific jurist of a high class, who in his works rises from rules of practice to the principles of eternal justice.

In every age and country different laws produce different results, the same laws generally producing the same results. Observing, then, the actions of mankind differing in the different grades of civilization, it is possible to estimate what rules for human conduct in civil society produce the most beneficial effects. If the Physical Sciences regard what is, and the Mental Sciences both what is and what ought to be—so the jurist, in the investigation of the science of right, should strive to make the actual law approach the ideal of legal perfection.

## DISTINCTION BETWEEN ETHICS AND JURISPRUDENCE.

Thus, Jurisprudence as an art, or legislation, has the same ratio to Jurisprudence as a science which the rules of practical morality bear to the Science of Ethics.

Bentham has correctly defined the limits between the provinces of Ethics and Jurisprudence. Ethics exhibits the rules of three classes of human actions—prudence, probity, and beneficence. Legislation interferes directly by means of punishment only. Punishment should not be applied when it is groundless, inefficacious, unprofitable, or needless.

The cases where the punishment would be unprofitable constitute the great field for the exclusive interference of Ethics.

Punishment as applied to guilt may be unprofitable in both or either of two ways: by the expense to which it would amount, even supposing it to be confined altogether to delinquency; or by the danger there may be of involving the innocent in the fate designed for the guilty.

Of the rules of moral duty, those which stand least in need of the assistance of the legislator are the rules of prudence. If one err in respect of prudence, it must arise either from some inadvertence or misapprehension with regard to the circumstances on which his happiness depends. The rules of pro-

bity are those which, in point of expediency, stand most in need of legislative assistance.

The idea of right is the bond between Ethics and Jurisprudence. Practical morality has been defined to be the art of directing the actions of individual men to the production of the greatest possible quantity of happiness by means of such motives as offer themselves. The art of legislation teaches how a multitude of men composing a community may be disposed to pursue that course which is most conducive to the happiness of the entire community by means of motives which are applied by the legislator. Ethics and Jurisprudence differ in the means which they employ. They coincide in one general ultimate end, the happiness of mankind by the regulation of human action.

The distinction between Ethics, or the Science of Moral Duties, and Jurisprudence, or the Science of Positive Laws, is compulsion by public authority.

And thus discussing Positive Laws upon the inductive method—examining the different legislative systems of different nations, and their results upon the happiness of mankind—comparing slavery with freedom, ignorance with knowledge, accordingly as these have been checked or developed by the great forces which have swayed human destinies—we, by the observation of facts and the use of reason, selecting the good, cloigning the bad, may gradually arrive at that system of law which is most in conformity with natural justice.



But the duties of the jurist and the legislator are perfectly distinct. The business of the jurist is merely to state those general principles which are true in all times and under all circumstances. The legislator must regard the historical development of the people. And it cannot be too often repeated that all actual legislation must be a compromise between history and philosophy. No two nations ever existed having precisely the same standard of morality embodied in their laws. In no nation is the moral standard the same at different periods of its development. The law is always below the moral standard of the best citizens, and above that of the worst. The legislator must take heed that his legislation coincides with the public opinion of the mass, or the enforcement of a law becomes impossible. Thus, dueling where the issue was fatal was murder, punished with death by the common law of England, but the law could not be enforced until late in the nineteenth century.

There is not in the whole compass of human affairs so noble a spectacle as that which is displayed in the progress of Jurisprudence, where we may contemplate the cautious and unwearied exertions of a succession of wise men through a long course of ages, withdrawing every case as it arises from the dangerous power of discretion, and subjecting it to inflexible rules of Positive Law.<sup>1</sup>

<sup>1</sup> Mackintosh.

What can be more instructive than to search out the first obscure and scanty fountains of that Jurisprudence, which now waters and enriches whole nations with so abundant and copious a flood; to observe the first principles of right springing up, involved in superstition and polluted by violence, until, by length of time and favorable circumstances, it has worked itself into clearness; to view the laws, sometimes lost and trodden down in the confusion of wars and tumults, and sometimes overruled by the hand of power—then victorious over tyranny, growing stronger and more decisive by the violence they have suffered—enriched even by those foreign conquests which threaten their entire destruction—softened and mellowed by peace and religion, and improved and exalted by commerce, by social intercourse, and that great opener of the mind, ingenuous science.<sup>1</sup>

#### LIMITS OF JURISPRUDENCE.

Justice alone of the virtues can be enforced by the public authority. Jurisprudence considers what range of human actions may come within the cognizance of justice, and what rights are capable of being protected by the Positive Law. Gratitude and benevolence are virtues, but incapable of being enforced by legal means, whereas, if one citizen take

<sup>1</sup> Edmund Burke.

the property of another, there is compensation, or punishment, or both.

The true objects of the Science of Jurisprudence are the knowledge of the legal relations which ought to be established by the Positive Law, and the ascertainment of the best means to enforce such relations.

These true principles of Jurisprudence are at the very base of the science of politics, and the due ascertainment of the province of government is perhaps the most important question of modern times. But the province of government is solely concerned with those human actions which are capable of being enforced by the public authority. It is idle for a government to try to enforce those duties which are incapable of being enforced by it. Duties such as these are not easy of definition, but an idea of them may be obtained by an exhaustive process of reasoning.

There are certain virtues of exalted character which can be attained only by persons of the most splendid moral and physical organization, placed in circumstances where these innate qualities have been developed to the highest pitch of excellence. When Leonidas died for liberty and civilization in the pass of Thermopylæ, he performed a duty to mankind; but what law could enforce the self-devotion of which we read the famous examples in ancient history?

That I may take a recent example : During the battle of Paris, in 1848, when the Archbishop of Paris advanced with the crucifix in his hand to meet the terrible Faubourgs St. Antoine and Marceau, careless about death, provided he brought peace, he was performing a duty, but a duty incapable of enforcement. The most exalted virtues, exemplified in the great actions which ennoble humanity, are attainable by few, and are beyond legislation.

There is another class of virtues manifested in external action, impossible to be enforced by legislative authority. Virtues such as these are less difficult to attain, and are more generally diffused, but still are abhorrent of compulsion.

Such is the virtue of benevolence.

Vincent de Paul devoted his life to the comfort of the afflicted. Las Casas toiled for years in the cause of the oppressed Indians. Howard visited all Europe, not to survey the sumptuousness of palaces or the stateliness of temples ; not to make accurate measurements of the remains of ancient grandeur, nor to form a scale of the curiosity of modern art ; not to collect medals, nor to collate manuscripts : but to dive into the depths of dungeons, to plunge into the infections of hospitals, to survey the mansions of sorrow and of pain, to take the gauge and dimensions of misery, depression, and contempt, to remember the forgotten, to attend to the neglected,

to visit the forsaken, and to compare and collate the distresses of all men in all countries.<sup>1</sup>

Nor is this exalted benevolence confined to such eminent persons. In our own time, Florence Nightingale organized a band of Sisters of Charity, who braved pestilence in the distant hospitals of Scutari, that they might afford relief to the agony of our wounded soldiers. A name in the page of history and the public thanks of a nation are great rewards for such services. But many abandon the splendor of a patrician life, the ties of family and home, and the luxuries of the civilization of the nineteenth century, in order, living an obscure existence, to console misery in the abodes of the poor. Benevolence, like friendship and gratitude, is beyond legislation.

Again, that we may proceed from the virtues which are shown in relations with other persons to those virtues which chiefly concern the individual—the law cannot enforce prudence, caution, self-control from vice, or a proper disposition in the expenditure of money. Within recent memory, in England, some gentlemen spend hundreds of thousands in supporting the Italian opera, others lavish hundreds of thousands on the turf. But the State cannot assume with success the guardianship of fortune. Next to the Crown lands, the worst managed property possessed by the English community is under

<sup>1</sup> Edmund Burke.

the Receivers of the Court of Chancery. The law cannot enforce wisdom in managing one's own, or beneficence in dealings with others; such things must be left to the discretion of individuals, to the progress of education, and to the results of an enlightened public opinion.

So, Positive Law appears to be powerless against the vice of intoxication, and can only punish the wretched drunkard who publicly offends against decency and order. The vice of drunkenness depends upon the will. In recent times, two great aids have been discovered to assist the drunkard's will—the use of a limited period in abstinence, and sympathy or fellow-feeling in abstinence. The greatest drunkards can abstain from drink if the time of abstinence be definitely fixed, so that they can look forward to a period when they can use their liberty again. Next comes the aid of sympathy. Men can do together and in company what they cannot do by themselves. Anything that is difficult to do, any exertion of resolution, any kind of self-denial, is made easier by the aid of sympathy, by knowing that other persons are feeling and doing the same thing. Father Mathew and other leaders of the temperance movement in England and Ireland well understood this principle of human nature when they organized the votaries of temperance into an army with medals, bands, and banners. But

no law has ever been successful in preventing the vice of drunkenness.

Now, if it be impossible to enforce by public authority, first, the most exalted virtues ; secondly, dispositions toward others, such as benevolence and friendship ; thirdly, virtues belonging to the class of prudence and self-control, how much more impossible must it be to force the individual sentiments of the mind into the particular form ordained by any human law. Yet in this last particular how many governments have erred !

But the individual acts of the mind are independent, and belief of anything rests upon the amount of evidence offered in respect of the fact to be proved, and the natural capacity of the mind for judgment. Belief is independent of the will.

At present, by the universal consent of civilization, what is involuntary deserves neither reward nor punishment at the hands of the magistrate ; but through the history of all nations, in the examples of religious persecution is seen the fearful amount of misery caused by persons invested with the supreme power attempting to enforce belief—a thing incapable of being enforced. And this alone is sufficient to show the importance of ascertaining the province of government—the importance of the Science of Jurisprudence.

## DEVELOPMENT OF SYMPATHY

The end of government is the security of rights. The natural rights of man are life, liberty, and property. To protect these rights has been the professed and real object of all the systems of civil polity that ever illumined the world with a ray of freedom. These rights, in the first beginnings of civilization, are not only practically insecure, but, even in theory, are imperfectly acknowledged. Where slavery still exists these rights are imperfect. The aggressive wars of our own times show that the rights of strangers to their lives and property are not yet perfectly admitted by the civilized States of the world.

The theory of Hobbes is not wholly wrong, that, agreeably to the lowest law of nature, man aims at the injury of his neighbor when a stranger to him. To savages, all strangers are enemies; everything unknown is an object of fear—*Omne ignotum pro horribili*. In all languages, the same word originally signified both stranger and enemy. But the more persons know one another, they generally love one another the more.

During the progress of civilization the sympathy of man for his fellow-creatures extends in an ever-widening circle. At first, none but immediate relatives are held entitled even to the common rights of life and property. Slaves are without rights. But in the advanced nations a poor-law provides for



even the outcasts of society, and humane legislation prevents cruelty to animals.

The first nucleus of society must have been the family, although nowhere in savage life has an isolated family been discovered unconnected with others by language or kindred. The existence of language proves that everywhere men exist in intellectual communities.

The family develops into the tribe. Men, whilst in the stage of the tribe, fanatically regard its interests beyond anything else. They do not yet recognize the positive rights of other men, belonging to other tribes, to their lives, liberties, and properties. They do not hesitate to rob and murder persons even belonging to neighboring tribes, speaking the same language, and having the same national origin. Thus, the Arabian tribes were engaged in mutual war before Mahomet for a time united them. The right of private war between the feudal barons was one of the most difficult to be abolished. The clans of the Scottish Highlands, up to the time of their disorganization, maintained the right of private war. The Indian tribes of North America still massacre one another when opportunity may offer. The petty tribes and nations of Africa still are engaged in deadly mutual strife, scarcely interrupted by their common danger from the superior arms and civilization of the Europeans. Yet during this phase the tribes of the same race in process of time regard one

another with less animosity than they regard persons belonging to other races. The Berbers of Northern Africa are sometimes mutually at peace, but toward Christians they entertain perpetual hostility. They rob and murder Christians whenever an opportunity may offer; nor do they perceive that they violate any natural right, or transgress any natural duty.

Sympathy develops from the tribe to the nation, and thence to the race. The word *δήμος* originally means parish; democracy now means the government by a people. In ancient Greece, though piracy at first was not a dishonorable profession, the rights of all Hellenes were finally recognized; but the rest of mankind were still considered barbarians, perpetual enemies, without natural rights to life, liberty, or property. The Roman citizen united many nations, but warred upon the rest of the ancient world. The Proconsul in the Roman theater applauded the sentiment: "*Homo sum, humani nil a me alienum puto,*" but he disregarded it in the foreign province. Still the acknowledgment of the rights of humanity, and the consequent fusion of races, unceasingly proceed. In modern Europe, the different States of France, once independent, have coalesced into one. The old kingdoms of Spain are now under one government. The British Islands, in which have existed such diversities of races and language, are now a United Kingdom. Most of the Slavonic races have coalesced under the Empire of Russia.

The disorganization and re-organization of Europe simultaneously proceed. The equilibrium of States is overthrown, whilst the harmony of nationalities is constituted. Italy is under one government. The Germans have obtained national unity under their Empire.

Such is the development of sympathy proceeding upon the more ancient idea of the bond of union existing between family, tribe, nation, and race, both for aggressive and defensive purposes.

Another development of sympathy, more based on reason, arises from the recognition of the equal rights of all men, as citizens of the world, to share in the gifts of providence. Commerce and emigration are the two great agents by which, in modern times, the clannish distinctions of nation or race are obliterated.

Amongst the races of men whilst in an imperfect state of development, the tie of country is so strong that nothing but the most positive evils of war, pestilence, and famine will compel them to abandon their native land.

In civilized countries, the poor may be divided into three principal classes. The first and least numerous is composed of those wretched beings, who, from organic deformity, whether manifested in mind or body, are unable to earn their bread; with them may be comprised the aged and infirm. The next class is composed of the wicked and idle, who refuse

to labor for their subsistence, and who, not possessing realized property of their own, are supported by the labor and charity of their friends. The third and most numerous class consists of the great masses of mankind, descendants of savages, who as yet have scarce emerged from primitive barbarism, and who, through ignorance of the methods of life, linger always upon the verge of starvation.

The last division includes the great majority of the poor in every country.

Ignorance has been the great check to prevent the poor from emigration. Men rather bear the ills they have than fly to others they know not of. But education has dissipated much of old prejudice. The German, English, and Irish poor know that beyond the Atlantic exists a continent where laws similar to their own are better and more cheaply administered, and where there is plenty of good land to be had at a low rate. The more go, the more will go, until the rate of wages and the rent of land will approximate in Europe and America.

The beneficial effects of the great European emigration to America and Australia in the nineteenth century can scarcely be overrated. Through this emigration millions emerged from poverty into the position of wealthy citizens. The next great advantage to the human family must spring from the fusion of races. The more the population is mixed the more prosperous will be the country. This re-

sult arises from the principle of the division of labor. Individual races excel in some qualities, and are deficient in others. The French, Italians, Germans, Slaves, and English of the present day each have their different qualities in which they severally surpass the rest; and if they were fused into one community of the United States, would each apply themselves solely to those departments of human skill and industry in which they are superior. This principle has long since been perceived, and termed the territorial division of labor. But it never can be completely developed whilst men remaining under different governments are separated by international tariffs, custom-houses, and wars.

In effect, pure races, like the Turks, languish and become etiolated. The most flourishing communities, like the city of Romulus, have sprung *ex colluvione gentium*. In the mythical story of the foundation of Rome, Livy tells us that the founder opened an asylum for fugitives—the political refugees of the neighboring petty States of Etruria and Latium. All the young men for whom society in those States provided no employment, and who became its enemies in consequence, as naturally as the sparks fly upward, fled to the protection of the seven hills of Rome. England has owed much of her greatness to being a similar asylum. Hither have fled the artisans of the Netherlands and France from the terror of the Duke of Alva and Louis

XIV, whilst the modern Englishman is the result of the Celt, the Roman, the Saxon, and the Norman.

In thus mentioning different races, I do not insist upon the intrinsic superiority of one race over another; nor do I use the term "race" to denote difference of origin. At the present time, certain aggregations of individuals have developed peculiar mental and physical qualities, and use different languages. So they are termed races. To a great extent, intellect and beauty depend on the advantages of good food and climate. Some races are at the height of prosperity; others in the lowest depths of degradation. The primitive causes of these things we know no more than the causes which have sunk Atlantic continents into the seas, and raised the Alps from the abysses of some primeval ocean. But St. Paul said at Athens, "God hath made of one blood all mankind to dwell upon the face of the earth." In the lowest Australian savage exists the germ of the intellect of Socrates, of Cæsar, of Bacon, of Newton, of Napoleon. From the most unsightly Esquimaux at the pole, or negro of the tropics, may, in the process of centuries, be developed forms of godlike strength and beauty, like the living models of the Athenian sculptor. Even in recent historical memory, the splendid Magyar aristocrat came from Asia—a Tartar savage—his language and origin the same as those of the Laplanders and Ostiaks. The Daco-Romans of Tran-

sylvania are the descendants of the Romans who conquered and colonized the ancient world. But a thousand years of prosperity have changed the Magyar into one of nature's finest types of man. Under a thousand years of oppression the Rouman peasantry have much degenerated from the type of the ancient Roman legionary.

For the polished Athenian, for the Roman citizen, for the feudal lord, sympathy with mankind did not exist. The stage of civilization at which no nation has yet arrived—to which all nations have a slow but certain tendency—is that in which men shall entertain the same sympathy toward all mankind which has been felt by them for family, tribe, nation, race; in which the crime of killing a stranger in aggressive war shall be regarded as murder is now regarded; in which the liberty of the individual shall be completely developed, and in which the absolute power of individual governments disappearing under international systems, men, true citizens of the world, shall possess over the earth their rights, and by the law the means of enforcing them.

Still, although all human races upon the earth are in a state of progress tending toward the same legal civilization, there need be no apprehension that the nations of the world will so fall into one sink of level avarice. The gifts of nature are variously scattered amongst the children of great national families, and the brilliant variety of genius.

taste, and imagination in races constitutes the splendor of mankind. The types of nationalities disappear with difficulty, and there is in nature one uniform variety. Grandeur and beauty would vanish from the earth if it were smoothed into level plainness. As the soldiers of all civilized nations use the same arms, so once that the laws shall be discovered under which we best may live in happiness, all nations in a similar state of civilization will adopt them. But the glorious diversity of mankind must ever still proceed.

#### DEFINITIONS IN JURISPRUDENCE HISTORICALLY CONSIDERED.

Jurisprudence embraces a great portion of what has been considered by various writers under the heads of Ethics, Polity, Political Philosophy, and Political Economy. Writers on Political Economy, in particular Adam Smith and John Stuart Mill, have discussed in their economical works many of the subjects of Jurisprudence. But Political Economy is only the science of exchanges. It has developed the great principle that exchanges should be free. Political Economy, starting from this principle, teaches as its corollaries that the permanent and regular increase of human comfort is grounded upon the absence, so far as depends on law, of all favored classes, professions, and pursuits;



in the equal protection afforded by the law to every citizen, and the unrestricted liberty of spending as he pleases his honest earnings. It teaches that the machinery of trade and commerce should be left free; that every system of restrictions or prohibitions on commercial intercourse cuts off the foreign market, diminishes the number of our buyers and the demand for our produce, and so checks production. It teaches that all men should be permitted, without the interference of their government, to produce whatever they consider it most to their interest to produce; that they should not by law be prevented from producing one thing, or by law be bribed to produce another; that they should, so far as is consistent with public morality, be left alone, and allowed to follow their own interests as they please.

But law has been only recently illustrated by its kindred sciences; very recently the existence of a science of society has been suspected; but recently has Political Economy or Jurisprudence been taught in the universities of the United Kingdom of Great Britain and Ireland. However, the general progress of society has told upon the progress of Jurisprudence in the British Islands. Our criminal law has made wise and merciful progress from the time when trial by ordeal and battle existed—from the time when mute prisoners were pressed to death—from the time when Sir Edward Coke prosecuted

Sir Walter Raleigh—from the time of Chief Justice Jeffrey's bloody western assize—from the time when prisoners were not allowed counsel to speak in their defense. So from the period when Lord Mansfield presided in the King's Bench, the doctrine and practice of our commercial law have been rapidly extended and improved. From the reign of William IV, the law of real property in England is undergoing a process of wise and beneficial reform. Independently of legal science, the progress of the nation in wealth and the arts introduces new species of property, and necessitates cheap and expeditious forms of procedure.

Still science aids the progress of society, and a knowledge of law is incomplete without the knowledge of what Bacon terms the law of laws—*leges legum*. One of the chief uses of Social Science is to teach clever men to do rapidly what ages with difficulty accomplish by the involuntary action of mankind. As Sir Edward Coke says, the reason of the law is the life of the law—for although a man can tell the law, if he knows not the reason thereof he shall soon forget his own superficial knowledge. But when he finds the right reason of the law, and so brings it to his natural reason that he comprehends it as his own, this will not only serve him for the understanding of that particular case, but of many others. The knowledge of law is complicated. To know is properly to understand

a thing by reason, and through its causes: *Cognitio legis est copulata et complicata. Scire autem est proprie rem ratione et per causam cognoscere.*

It has been maintained by many that politics and laws cannot be reduced into a science: the ancient Sophists were of opinion that there were no such things as right and wrong by nature, but only by convention. That which appears just and honorable for each city is so for that city so long as the opinion is entertained, was one of their maxims. The opinions of the Sophists may have been exaggerated by their great opponent, Plato: still, I believe they did protest energetically against the possibility of metaphysical science, whilst Plato, against them, maintained in the doctrine which Pope has poetically translated:

“All nature is but art unknown to thee;  
All chance, direction which thou canst not see;  
All discord, harmony not understood;  
All partial evil, universal good.”

The possibility of metaphysical science, and, in particular, of the complete development of a science of law and government, is now admitted. The great system of Jurisprudence, says Sir William Jones, like that of the universe, consists of many subordinate systems, all of which are connected by nice links and beautiful dependencies, and each of which is reducible to a few plain elements. If law be a science, and really deserves so sublime a name,

it must be grounded upon principle, and claim an exalted rank in the empire of reason; but if it be merely an unconnected series of decrees and ordinances, its use may remain, though its dignity may be lessened; and he will become the greatest lawyer who has the greatest natural or artificial memory.

So Edmund Burke has said that we are all born in subjection, all born equally, high and low, governors and governed: in subjection to one great immutable and predestined law—prior to all our devices and prior to all our contrivances—paramount to all our ideas and all our sensations—antecedent to our very existence, by which we are knit and connected with the eternal frame of the universe, out of which we cannot stir. And he has described the Science of Jurisprudence as the pride of the intellect, the collected wisdom of ages—combining the principles of original justice with the infinite variety of human concerns.

So, also, Vico considered that the development of society, like the heart of man, was subject to one constant, universal, and divine law; the variable application and progress of which depended upon the uncertain will and erring nature of man; and he hence conceived the hope of discovering the eternal principles of the natural law.

In Jurisprudence, a law, properly so-called, is a rule of conduct addressed to creatures capable of

feeling an obligation by means of reason ; or a law may be defined as a general command given by one intelligent being to another.

St. Thomas Aquinas defined law as a certain rule and measure according to which any agent is led to act or restrain from acting : *Lex est quedam regula et mensura, secundum quam inducitur aliquis ad agendum, vel ab agendo retrahitur.* This definition is plainly too indefinite and extensive. Suarez gives another description, and says a law is a certain measure of moral acts, of such a kind that by conformity to it they are morally right ; by discordance with it, morally wrong : *Lex est mensura quedam actuum moralium, ita ut per conformitatem ad illam rectitudinem moralem habeant, et si ab illa discordent obliqui sunt.*

Up to the present time, four great divisions of law have been enumerated by jurists : Divine Law, Natural Law, International Law, and Positive Law.

With the pagan philosophers, following Plato, the Divine Law was the sovereign reason existing in the mind of God.

The doctors of the Middle Ages termed this principle of nature the Eternal Law. The Divine Law, with Plato, is the governing reason existing in the mind of the Universal Deity, which theologians also acknowledge, but call the Eternal Law. *Lex ergo divina apud Platonem est ratio gubernatrix universi in Dei mente existens, quam legem etiam*

*Theologi agnoscunt sed legem æternam appellant.*

The Positive Divine Law is that which has been immediately promulgated by God. *Lex positiva divina dicitur, quæ ab ipso Deo immediate lata est et toti legi naturali addita.* Our duty as to the Divine Law is simply to know it and obey it.

The Natural Law, according to Grotius, consists in certain principles of rectitude of reason, which enable us to know whether an action is morally right or wrong according to its congruity with a reasonable and social nature. *Jus naturale est dictatum rectæ rationis indicans actui alicui, ex ejus convenientia vel disconvenientia cum ipsâ naturâ rationali, inesse moralem turpitudinem aut necessitatem moralem, et consequenter ab auctore naturæ ipso deo talem actum aut vetari aut præcipi.* The Natural Law is thus considered under two aspects: first, its nature and essential qualities; secondly, its obligatory force.

Grotius compiled this definition from the previous authorities. But in Jurisprudence it can scarcely be adopted as correct. This definition of Natural Law embraces the whole sphere of both moral and legal duty. In Jurisprudence, however, Natural Law cannot include so wide a circle. It only includes the rights and duties capable of being enforced by the power of the State.

It is most important in legislation to avoid intermeddling with the peculiar province of Ethics or Divinity. The Divine Law is the province of the

theologian, Ethics is the province of the moral philosopher. Neither uses the compulsion which it is the province of the legislator to employ.

Natural Law may accordingly be correctly defined as the theory of that part of our duties which, in reason and equity, is capable of being exacted.

On the other hand, if Jurisprudence be viewed as only one branch of the Social Science whose object is to ascertain the great natural law of the progress and development of society, and according to what laws men may best live in happiness—then Jurisprudence may be held to include the entire domain of the rights and duties which come within the province of Positive Law, Ethics, and Theology. The definition of St. Chrysostom might then be adopted, that Natural Law is the instinctive knowledge of good and evil (*αὐτοδιδασκτος ἡ γνῶσις τῶν καλῶν, καὶ τῶν οὐ τοιούτων*). As civilization proceeds, Jurisprudence continually encroaches upon the kindred sciences, and embraces an ever-widening range of social rights and obligations. I repeat an illustration. In the early ages of society, human slaves have no rights. In modern times, animals are recognized as having a right to good treatment, and cruelty is punished by the Positive Law.

The purposes of laws were distinguished by Modestinus: to command, to forbid, to permit, or to punish.

The laws rendered effectual by rewards were de-

fined to be of two species: first, those the object of which is to induce men to do something which all men are unable to do—such as those which offer a reward for scientific inventions; secondly, those laws the object of which is to make men more vigilant in the performance of legal duties, or in the enforcing of other laws—such as laws offering rewards for the detection of offenders.

The civilians attempted to point out the laws made by States not conformably to the law of nature; thus, slavery was described as an institution of the law of nations contrary to the law of nature. Domat, following the civilians, has divided all laws into immutable, and mutable, or arbitrary. The former are defined as those which, being principles of the law of nature, cannot be changed without violating those natural obligations upon which the order of society is founded; the latter are defined as those which are not principles of Natural Law, and which, as they are not essential to the obligations in which society is founded, may be changed without violating those obligations.

These definitions are erroneous. In one stage of society, slavery is as natural as freedom in another stage. In barbarous countries, order cannot be maintained without a despotism impossible in free countries. Tyranny is equally the result of the natural law of one stage of society, as liberty is of another. The problem of society is to combine order with



freedom. According to a natural law, society appears to progress from barbarism to civilization; and to assist that progress, the Social Sciences contribute their aid by ascertaining under what positive laws men in their present stage of civilization best may live in happiness.

There have been thus two principal definitions of Natural Law. The Institutes define Natural Law as that which nature has taught to animals. The Institutes assert that this law belongs, not to the human race alone, but to all animated beings which are produced in the heavens, the earth, or the sea. This is erroneous, because in Jurisprudence nothing can be properly called a law, except a rule of conduct addressed to and binding on creatures capable of feeling an obligation by means of reason. Cicero, on the other hand, says: *Ex qua illa lex quam Dei humano generi dederunt recte est laudata; est enim ratio mensque sapientis ad jubendum et ad deterrendum idonea.*

The definition of Justinian is not a legal definition, but one which might be placed as an axiom for any science. But, again I repeat, Natural Law, legally defined as a subject of Jurisprudence, is the theory of those duties capable of being enforced.

The fundamental principle and starting point of Natural Law is the natural equality of the rights of all men. But in society this theoretical equality is speedily destroyed by the diversity of their respect-

ive and reciprocal duties and rights, as members of families, as reasonable beings living under the social state, and as having voluntarily entered into and contracted obligations with one another by express or tacit consent.

The Natural Law includes all the principles of right common to just men living in civilization. And the doctors of the Middle Ages, accordingly, have defined Natural Law as the principle in the human mind by which the just is discerned from the unjust. Thus, Suarez says: The Natural Law which pertains to moral philosophy and theology is that which is seated in the human mind to distinguish good from bad. *Lex ergo naturalis propria quæ ad moralem doctrinam et theologiam pertinet, est illa quæ humane menti insidet ad discernendum honestum a turpi.*

Positive Law is the law of human enactment. It is called Positive as existing by position. For hence it is called Positive as it were added to Natural Law, not necessarily flowing from it. Whence by some it is called fixed law. *Inde enim positiva dicta est quasi addita naturali legi non ex illa necessario manans. Unde ab aliquibus jus positum vocatur.* With former jurists, and before the importance of International Law was recognized, Positive Law was held to mean the law enacted by the sovereign government of an independent political society. It must now be taken to include also International

Law, so far as the latter is capable of being ascertained and enforced. The element of compulsion to obedience through the public force distinguishes the Positive Law from all others enumerated by jurists or moralists.

Sir William Blackstone and others have termed this species of law Municipal Law. But the term is inappropriate. Derivatively, the word "municipal" refers to a corporate town. Blackstone defines Municipal Law—or, as it should be termed, Positive Law—as a rule of civil conduct prescribed by the supreme power in a State, commanding what is right and prohibiting what is wrong.

Now, the error of this definition is, that a law prescribed by the supreme power in a State is still a law, even though it does not correspond with the latter part of this definition, and command what is right and prohibit what is wrong. The essence of a positive law is compulsion by the public authority; and provided the force of a State be employed to compel obedience to any rule of civil conduct, such rule is a law. A bad law is that which imposes an obligation without doing any service. There have been evil laws in all ages, yet they have not the less been laws.

Internal Positive Law is, therefore, a rule of civil conduct prescribed by the supreme power in a State.

It is defined as a rule, in order to distinguish it from anything in the nature of a sudden command,

a request from an inferior, an advice from a friend, or a compact between equals.

It is termed a rule of civil conduct, that it may be distinguished from the rules of moral conduct, with which, as such, the public law does not interfere. The criminal branch of Positive Law does not punish vices, only crimes. The civil branch of Positive Law is concerned with the maintenance and enforcement of private rights, where the violation of them has not affected directly the public security. Individual wickedness is not punished directly by the law, except where it interferes with the happiness of others in a manner of which the laws can take cognizance. The prodigal may squander his fortune in dissipation, the fool may waste it by reckless mismanagement, the miser may bury it from his friends and the world, but the law is unable to enforce prudence in dealing with one's own, or benevolence toward others. Such things must be left to the progress of knowledge and education, for justice alone, of all the virtues, can be enforced by the public authority.

Again, the rule of law is prescribed—that is, promulgated by the official power of the State, and, in the last resort, enforced. Laws, to be obeyed, must be known. Yet ignorance of the law must never be permitted to be urged as an excuse for any accountable citizen. *Ignorantia juris neminem excusat.* No man ought to be permitted to profit by

his ignorance of the law, so as to place himself in a more advantageous position than another, who did not neglect to make himself acquainted with those rules to which every member of the society ought to conform.

In the Institutes of Justinian the subjects of law are divided into persons, things, and actions. This arrangement has been followed, in modern times, in the Code Frederic, the Code Napoléon, and by Sir William Blackstone, in his Commentaries upon the Laws of England. It is a most unscientific division, and has checked the progress of the Science of Jurisprudence in Germany, France, and England.

Leibnitz first pointed out that the Roman arrangement confounds fact with law, and assumes as the objects of law persons and things, which are no more the objects of human law than they are the objects of the greater number of the arts and sciences. Such a division is founded, not upon matters of law, or differences in the component parts of law, but upon matters of fact, or differences in substances mental and material, tending to indefinite repetitions. The Roman division of things into corporeal and incorporeal is equally wrong. The term "incorporeal things" was a mere fiction to hide the confusion of ideas. All these incorporeal things are only rights to the services of men.

The compilers of the Roman Code set out with a wrong division into two parts which are not exclu-

sive with regard to each other—rights of persons, rights of things. They were led to this division by a species of grammatical symmetry. But there is no correspondence between the two terms, except as to form. There is none as to sense. The term “rights of persons” is clear. It means rights conferred by the law on persons, rights which persons may enjoy. But if this explanation be transferred to the term “rights of things,” it leads to an absurdity. Things can have no rights belonging to them. The law confers no rights on things. The law does not favor things. Instead of “rights of things” the expression ought to be “rights of persons over things.” The change appears slight. But it overthrows the nomenclature—the division of rights, the pretended arrangement of the Roman lawyers adopted by Blackstone, and according to which he has classified the objects of law.

#### THE SCIENTIFIC DEFINITIONS IN JURISPRUDENCE.

Such have been the views of some most eminent jurists in their department of knowledge. I propose a more convenient division and nomenclature of Jurisprudence and Positive Law. In the present state of the science, the following classification of its departments appears correct:

Jurisprudence is the Science of Positive Laws, the Art of Legislation, and the Practice of Law.

A Positive Law is a rule of civil conduct prescribed and enforced by a State.

In the Positive Law of every nation there are two elements—the philosophical and the historical. The first element to be acknowledged is the philosophical. The absolute ideas of justice and truth constitute its essence. But these ideas assume different forms in different States. Prejudices, manners, and passions change and deform them. And, in law, history becomes associated with philosophy. From this union the Positive Law of every State arises. And Positive Law becomes an association of universal principles and of national maxims, of rational axioms and of political adages. Legislation ought to be a compromise between history and philosophy.

The end of Jurisprudence is utility, or the happiness of mankind. Nor is this principle peculiar to Jurisprudence. But it has been the professed and real end of all the sciences and arts. The greatest happiness of the greatest number is the true object of legislation.

All the sciences and arts have for their end and aim utility, civilization, and the happiness of mankind.

Civilization is the highest development of the physical and intellectual faculties of mankind.

Jurisprudence, like every other mental science in the discussion of subjects within the domain of the

will, considers not only what the law is, but what it ought to be.

The virtue of justice is the disposition to give every man his right.

Justice alone, of all the virtues, can be enforced by the public authority.

Legal relations are those which arise from the natural constitution of mankind, and which give individuals a right to the use of force as necessary to society.

The subjects of Jurisprudence are rights and their correlative duties.

Rights are defined by Jurisprudence.

Legal duties are enforced by the Positive Law.

The three natural rights of man are life, liberty, and property.

Rights arise between persons concerning either persons or things.

Actions, or forms of legal procedure, are the means by which the performance of rights is insured, or by which the violation of rights is redressed.

An action is the legal demand of a right.

Actions include both a civil action, or the legal demand of a right by an individual—in which the end sought is either performance of a contract, or compensation for breach of contract, or compensation for injury—and a State prosecution, in which the end is punishment.

If the different rights and duties incident to man



in society be analyzed, they naturally divide themselves into four classes :

Those which arise between individuals in such a manner that the community is not immediately concerned with them.

Those which arise between individuals in such a manner that the community is directly concerned, and directly suffers by the violation of the right.

Those which arise between individuals and their government.

Those which arise between different States, or the subjects of different States.

Rights and duties arise between individuals in such a manner that the community is not immediately concerned with them. For example, in a civilized country, if a merchant do not deliver corn to a purchaser according to the contract of sale, the violation of the right of property does not immediately cause any injury to the rest of the community.

Rights and duties arise between individuals in such a manner that the community is immediately concerned, and immediately suffers by the infringement. If a burglar break into a house at night, or if a highway robber assault and murder a traveler, the rest of the community are directly injured, independently of the parties immediately wronged. Persons in the neighborhood of the burglary are put to the expense of protecting their houses by ad-

ditional safeguards. Perhaps they are obliged to pay additional taxes for police. Terror is diffused. A sense of wrong is therefore sustained by the community, and vents itself in the punishment of the offender with an intensity proportioned to the degree of injury caused by him, and the degree of suffering felt by the people.

Revenge is the origin of punishment. In the early stages of society, punishment is severe according to the hatred against the offender, and the indignation which his neighbors feel toward him. The accumulated rage of a community against an individual murderer demands his death. Finally, in the more advanced stage of society, the reformation of the criminal is attempted, and punishment is used only as an example and a means for the prevention of crime, that the punishment may reach a few, the fear, all: *ut pœna ad paucos, metus ad omnes perveniat.*

The division of Positive Law which enforces the performance of contracts and gives individuals compensation for a violation of their rights, is termed the Civil Law. The division of Positive Law which punishes offenses is termed Criminal Law. If performance can be enforced, or if damages completely satisfy the loss, and if the public security is not weakened by the injury, the matter may safely be left to the Civil Law. But whenever the public security is endangered, compensation is

insufficient to vindicate justice, and punishment must be added.

A crime is that violation of a right for which the State provides punishment.

The chief end of the Civil Law is the enforcement of contracts or compensation, the chief end of the Criminal Law is punishment; but in many cases both have a concurrent jurisdiction.

If we desire to ascertain whether a violation of the natural rights of man—life, liberty, and property—come within the province of the Civil or of the Criminal Law, we have only to ascertain whether such violation concern the individual immediately and the community remotely, or whether the interest of the community be not thereby directly affected.

Rights and duties arise between individuals and their governments.

The procedure to redress the violation of a right is in all the rude stages of society vague, violent, and uncertain. The savage, who has been wronged, waylays and assassinates the enemy, or else, in the struggle, falls—the victim of superior strength. In time, the authority of the law assumes the place of uncertain strife; and the process by which mankind submit their disputes to the cognizance of legal tribunals is perpetually developed further.

At first, only the rights arising between subjects are determined and protected by the law, whilst the

sovereign remains above the law. Under barbaric despotism, the sovereign acknowledges no legal rule binding upon him in his conduct toward his subjects.

But in time the relations between the government and the people become subjected to certain positive laws. And the body of law determining the relations between individuals and their governments is generally termed Constitutional Law, or Political Law—the latter term is preferable.

The things of the world must be appropriated whenever that appropriation is necessary, for the purpose of rendering them as beneficial and valuable as their nature admits of their being made.

The business of government is to promote the happiness of mankind, by means of rewards and punishments. The rewards, however, in most cases, are given indirectly to the energetic and able men who carry on the political and legal business of the society.

Government is a necessity. If all men were cultivated, virtuous, and talented, they would discharge toward others all the duties of life better than any government could enforce them. A community of such persons would be a law unto themselves, needing no coercion; and each individual would be urged by the spontaneous impulses of his own nature to do right. Rivers, in the comedy of "False Delicacy," well says: "Laws were never made for

men of honor—they want no law but the reetitude of their own sentiments, and laws are of no use but to bind the villains of society.”

However, laws are of use to bind others besides villains ; and the object of every good government is, by means of laws, to strive to bring all its subjects up to that standard of duty which the wisest and best of themselves attain.

If this, then, be the necessity for government, we have to consider what right a government has to -coerce and punish its subjects upon occasion.

It is necessary to define the three natural rights of men—life, liberty, and property.

Natural liberty is the individual's right of not being obliged by any judgment or will with which his own judgment and will do not coincide. But, scientifically defined in Jurisprudence, liberty is freedom of action, controlled only by laws tending to promote the greatest happiness of the greatest number.

Slavery is obligation of service unlimited in extent or time.

Property is the right of using.

The right of property is founded upon its subserviency to the subsistence and well-being of mankind. The institution of property is necessary for social order. The exclusive appropriation of things is essential for the full enjoyment of them. The sense of property is bestowed upon mankind for the

purpose of rousing them to action. It is the principal foundation of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice.

In the right of property, Bentham includes four things :

1. The right of occupation.

2. The right of excluding others.

3. The right of disposition, or the right of transfer to others.

4. The right of transmission, in virtue of which the integral right is transmitted after the death of the proprietor, without any disposition, on his part, to those in whose possession he would desire to place it.

All modern civilized life, in Western Europe, rests upon the two institutions of property and marriage.

The original titles to property are occupancy and labor. Finders are keepers by common consent, where there has been no previous appropriation. What a man has produced by labor is his own.

The secondary titles to property are consent and inheritance.

Consent includes gift, sale, and exchange.

The right of inheritance by children of the property of their parents depends on three principles: the children may have contributed by their labor to the formation of the property; naturally they expect to receive it, and the State's gift to them of

the property prevents disappointment; lastly, by the receipt they are prevented from becoming a burden to the people. From the inheritance by children to the inheritance by relations the transition was easy and obvious.

Some jurists and publicists have proposed that by law the discretion of the testator should be limited to this: that a certain fixed portion of the property should be distributed amongst the immediate descendants, in a ratio suitable to the property and position of the testator. Where persons die without kindred, and intestate, the State must succeed to their property. In order to avoid contention an ultimate heir—*ultimus hæres*—must be appointed.

#### POLITICAL JURISPRUDENCE.

The great questions of Political Jurisprudence, the right of government to the use of force, the province of government, its duties as the machine of police and order, and as the guide to progress, demand a more lengthened investigation.

The right of society to enforce the law by punishment may be judged from the following considerations:

When man enters into society he naturally intrusts the three rights of life, liberty, and property to the guardianship of his rulers.

As every man in his independent state has by

nature the disposal of his property, he can convey the disposal thereof to society as amply and absolutely as he was by separate right entitled thereto.

It is the right, perhaps the duty, of every man to defend his life, liberty, and property. It is his right to kill or bind those who would grievously wrong him—this right he can convey.

Upon such conveyance it becomes the right and duty of the trustees of society to put to death, or imprison, or inflict any punishment suitable for the prevention of crime, upon all who take away, or attempt to take away, the life, liberty, or property of its members.

In the infancy of civilization, the private disputes of individuals appear to be decided by arbitrators, chosen and paid by the litigants. Afterward, the State is naturally resorted to as the decider of disputes, because it is the only impartial third party possessing the requisite compulsory force. The whole people, in its collective capacity, is incapable of exercising legal power correctly. For such power ought to be exercised with intelligence and impartiality; and from the tribunal must be excluded the aggressor, the injured party, and their friends. Where the judicial body is very numerous, and where the responsibility is much divided, an honest decision in important cases appears impossible. Historical examples of this are the Athenian Courts in political trials, and the decisions of the



English House of Commons as to contested elections when the entire House voted, before the Grenville Act was passed, which referred such matters to a select committee.

The three functions of government are the judicial, legislative, and executive.

In the infancy of society, all political powers are united. They are all held in the hand of the sovereign, and obey his arbitrary will. But, according to the natural law of the division of labor, a separation of these powers takes place. The sovereign sinks under the weight of duties which surpass his strength, and which cannot be neglected without exposing himself to complaints, disagreeable even to despotism. To dissipate alarm, and prevent resistance, the protection of a special authority is given to what citizens hold most dear—their property, their personal liberty, their life. The judicial order is founded. By the establishment of tribunals, nations enter into the path of regular institutions.

In point of time, the judicial power is prior to the legislative, as disputes must have arisen and have been decided before the State thought of enacting a law to regulate future controversy. The duty of Courts of Justice is to apply the law. But, if the law be arbitrary, the security which tribunals accomplish is illusory and incomplete. As a consequence of the judicial establishment, law must be rendered certain. The right of legislation in the

progress of society ceases to belong to the sovereign power, and is transferred to assemblies which represent the nation.

Two powers, the judicial and the legislative, are thus detached, and acquire a separate existence. To the sovereign is reserved only the executive power.

The executive power is divided into two branches—the political, that is to say, the direction of the general interests of the nation, and the administrative, which consists in the accomplishment of the public service.

Under constitutional government, political power passes to the legislative assemblies representing the people. The more parliamentary power increases, the more it invades the domain of politics. It conducts the policy of a nation by laws, by financial votes. Arrived at its extreme development, it leaves to the executive power only the accomplishment of that which it has previously determined.

Similarly, in the advanced nations, the institution of police takes the power of punishment from the hands of the central government, and, except in the instances of great crimes, confides it to local administration.

Police is a system of precaution for the prevention of crimes and calamities.

It is a step in the progress of society, and in the development of the liberty of the individual, where order is maintained under a system of police, not

under soldiers devoted to the central authority and isolated from the citizens.

The private law of a State is divided: as to its sources, into common or statute law; as to its subject-matter, into rights and obligations; and as to the mode of ascertaining and enforcing them, into civil and criminal law. Procedure is the course taken for the execution of the laws. It is the method of employing the instrument called law.

The laws of procedure are termed adjective, because they assist the enforcing of the substantive laws. The business of a Court of Justice is to examine and ascertain, by legal evidence, the facts; to apply the law to those facts; to pronounce judgment that such is the law, and that certain consequences will follow to individuals, or their property, if the law be not obeyed.

The Political Law of a nation is the whole of the legal relations existing between the governors and the governed. It determines the organization of the legislative, executive, and judicial powers.

Political Jurisprudence embraces a wide range of study—the constitutional history of the Oriental nations, of Greece, of Rome, of the Italian Republics, of France, of Germany, of Russia, of England, of the United States—in a word, of all the nations that have developed important political systems. In the progress and development of society, the most intricate questions arise as to the separation of

the judicial, legislative, and executive powers of government, and with respect to taxation and colonization.

In Jurisprudence, the term "constitution" of a State embraces the body of the written and unwritten fundamental laws which regulate the rights and privileges of magistrates and subjects.

Union in society is the destiny of man. This does not arise from the social compact of which the philosophers of the eighteenth century dreamed; it is progressively worked out by the interior development of the family, and the aggregation of other families. The sense of property is amongst the earliest of our ideas. The child knows he owns his toy as well as the peer knows he owns his land.

Civil government arises from the desire of men to protect their property and combine order and freedom in their intercourse with one another. The interposition of the State is required to redress wrongs, to determine disputes, to enforce obligations. Without government, no property could be secure, no liberty certain, no civilization completely developed. At first, order is the main purpose of government, whilst personal liberty and individual security for property are not so much regarded by those in power. Yet the despotisms of Asia are preferable to anarchy. Men prove this by living and trading under such systems. In effect, where undeveloped and partially civilized communities ex-

ist, absolute monarchy appears to be the natural form of government — as children learn to obey others before they learn to act for themselves.

The tendency of civilization, as developed in the most advanced countries, is to diminish the great power which the central government possesses in the early stages of society, whilst in modern times the entire force of a country can be more directly used for external purposes.

With the progress of knowledge the despotical restraint becomes intolerable ; it is no longer necessary, and it disappears. Then the liberty of the individual subject is perfect. The importance of the individual governor ceases. Government becomes the mere machine of police and order. In the more advanced and republican nations, the individual becomes emancipated from any permanent bond of allegiance. He can transfer his person and property to whatever soil he pleases, secure of equal protection in England or the United States, provided he obey the law. The secret of organized liberty is willing obedience to limited power.

The forms of government differ in various countries, and from causes hitherto by politicians termed accidents. Yet even politics in time may be reduced into a science ; and from political history may be derived certain general principles which will hold true at all times and under all circumstances.

The different forms of government, the distribu-

tion in each State of the power by which the people are governed, the influence of such diversities upon the prosperity of the several nations subject to them, these are facts from which must be drawn the principles which constitute the Science of Political Jurisprudence. Two systems of government now contend for superiority in the civilized world. One is the system of freedom of popular institutions and of representative government, as exemplified in England and the United States of North America. The other is the system of centralized despotism. The principal political disadvantage of despotism is that it rarely opens a career to the talents of the people. And political dissatisfaction much depresses public industry. The main advantage of the system of freedom is that it opens a career to talents. Nor does it appear now possible to govern enlightened populations by the iron despotic rule of former times. A despotism, to be cheerfully obeyed, must be that of greatness of intellect and knowledge over ignorance and incapacity. Whenever a great man has been a successful despot, he has succeeded by his power of organizing obedience to himself, and by procuring the talent and energy of his fellows to work in whatever direction his genius led.

Alexander, by his greatness of soul and power of organization, disciplined the soldiers of Greece, marched with ease to the Oxus and the Indus, and overwhelmed the barbaric empires of the day. He

was cheerfully obeyed. All the clever men of Greece were proud to be captains under him; but when he died they aspired to be kings, they quarreled with one another, and the rule of Greece over Asia ceased. So, Cæsar and Napoleon were organizers of great political revolutions. But in order now to acquire the power of Cæsar, one must of necessity be in intellect and power as far superior to the country gentlemen, lawyers, merchants, editors, artists, tradesmen, and students that swarm through modern society, and who develop, criticise, and influence the life in which we live, as these latter are in knowledge, political capacity, power of critical perception, and practical ability, superior to the senators, knights, and plebeians of the last days of republican Rome.

Napoleon, whilst he held power, in many respects used it well. The public works which his administrative genius constructed—the code of laws which owes its origin to him—these things show what may be done by despotism. But the fall even of Napoleon was hastened by men who insisted on a share in the public government, and were not content with the emperor's promotion of solely military talents. Yet men like Cæsar and Napoleon arise but once in a thousand years. So far as we have record, there were not five other such in all history. And the rules of politics, law, and government must be made with a view to the ordinary capacities of man-

kind, and not with the hope of a perpetual succession of men like Napoleon and Cæsar in every State.

The middle classes never had a career more open to talent than now in England. Competitive examination permits all to enter the great civil and military services. A great political career is more difficult of attainment for those who are unaided by the advantages of birth and wealth. But many fortunate circumstances have developed English liberty. Many centuries have moulded our political organization. Many races have formed our modern character. The reckless courage and plastic spirit of the Celt, the genius of the Roman for law and government, the working earnestness of the Saxon, the chivalry of the Norman—these things, aided by that zeal for knowledge which consults the wisdom of all languages and ages, aided by those mechanical inventions which circulate the thoughts of the great men of all time through the enlightened populations of these realms—all form the constituent elements of the modern civilization of England; and that civilization will never brook a despotism, however beneficent.

#### PROVINCE OF GOVERNMENT—TAXATION.

Security is the principal advantage possessed by modern society beyond every previous stage of man's



social existence. Security does not now exist only for privileged races or classes, but, in most civilized countries, is for all. By this protection of the law the public liberty exists, so far as liberty is security against the aggression of the powerful members of society. When we analyze the means by which this modern security is obtained for the populations of civilized countries, we find it is through the public machinery of justice and police, supported by the public taxation. The desire for property is one of the strongest springs of social advancement. But unless property be protected, labor ceases. Unless there be security for industry, man will not labor, and taxation is the price paid for security. Not but that there may exist the heaviest burdens of taxation with, at the same time, very little security for the taxpayers. The Roman proconsuls established a system of legalized plunder over the provinces, as the Turkish pachas now do. And all over the world exist examples of countries, once rich and flourishing, reduced, under the heaviest pressure of taxation, by evil laws, above all, by the want of security for industry, to poverty, desolation, and decay. So, wherever upon the earth, by law, one man is enabled to reap the fruits of another's labor without compensating the latter, there security does not exist in that degree which legislation should seek to attain. *Jure naturæ æquum est neminem alterius detrimento et injuria fieri locupletiozem.*

The amount of taxation may in two ways be excessive in proportion to the security obtained, either in consequence of the public functionaries who discharge the public duties of justice and order being paid at too high a rate, or in consequence of a portion of the inhabitants of the State being excluded from the benefit of the laws. Slaves are almost excluded from the benefit of the law. In Ireland, until Mr. Gladstone passed his Land Act, the tenants, not being the legal proprietors of the land, were compelled to cultivate at the risk of their improvements being confiscated by the proprietor to his own use. In the representative governments of modern times there is a constant economic tendency at work, desiring to obtain the highest degree of official aptitude at the least expense. So, in proportion to the increasing wealth and population of the most advanced countries, the public business is conducted at less cost than in former times. And in such countries as England and the United States, taxation may be said to be the price of security, since but a very small portion of their public general taxation is squandered uselessly.

Taxation is one of the subjects which equally are within the limits of Political Economy and Jurisprudence. The study of the Political and Social Sciences is, above all things, most fruitful in beneficial results of a practical nature. It teaches us to employ the experience of one age or nation to di-

rect another, and save it expense, inconvenience, and delay; it points out the errors committed in former systems of civil and commercial polity; it shows how such errors are to be corrected or avoided, and how such systems may be most effectually improved in order to advance the happiness of nations.

Few subjects have exercised so great an influence on the destinies of States as the systems of taxation respectively adopted by them. The word taxation is found in all the stirring pages of modern history. Evil systems of taxation have caused many of the revolutions of the world. Who has not heard of the ship-money in England, the tea-duties at Boston, the *taille* and *gabelle* in France, and the consequences which they aided to produce? Until recent times, few attempts were made to ascertain the true principles of taxation, and the mode in which different systems have influenced and do influence the public welfare. The reasons for this are to be found in the military character of the governments of the ancient world; the principles of the feudal system; the incorrect ideas which, down to a late period, prevailed, concerning the province of government; the late diffusion of knowledge and education; the late rise into respect and importance of the mercantile and manufacturing classes of the community.

A *tax* is a portion of the property of individuals living in society, given by them to their government

in exchange for the security which it affords them. *Taxation* is the general levy of particular taxes upon the community. The word is also used to mean that part of the Science of Jurisprudence or of Political Economy which treats of the manner of levying taxes. The word *tax* is probably derived from the same root as the verb "to take," and literally means something taken or lifted. In Latin, we meet the words *taxare, taxatio*—in German, *taeckse*—in French, *taxer*—in Italian, *tassare*. In English, the word *task* seems originally to have been synonymous with *tax*. Thus, in the old statute, the *confirmatio chartarum*, (25th Edward I) we meet the expression, "aids, tasks, and prises."

The taxes in all civilized countries are devoted to almost the same objects. It is necessary to maintain an army and navy, to guard our properties and liberties against foreign ambition or domestic sedition. In all civilized societies, the proper administration of justice and the punishment of criminals are necessary for the existence of the community: part of our taxation is devoted to the business of justice and police. In all governments it is necessary to pay the officers at a high rate, in order that able men may be obtained to fill such offices: part of our taxation is devoted to the payment of those who carry on the transactions of government. In all countries it is necessary to support in proper affluence and dignity the head of the nation: and

every country accordingly pays something to maintain the head of the nation, whether that head be the chief of a barbarous tribe, or, as in civilized countries, called emperor, king, or president. Part of the taxation of all the old countries of the world that maintain their credit, defrays the interest of the national debt, contracted in former years, when the taxes raised were not sufficient to meet the expenditure.

It has been made a question with some jurists, although seldom in modern times, whether the support of paupers should be provided for at the public expense. Paupers have no absolute right to support founded on the institution of society. It cannot be said that those who possess property are, on account of the possession of that property, bound to feed those who do not possess it, and are unable to maintain themselves. The latter are not in a worse condition than they would have been had society and property never existed. But in relation to civil society, the right of paupers to subsistence may be said to be founded on the obedience to the law which society exacts from them. For breaking the law as regards property they would be punished, but not in modern times starved, or otherwise put to death. If one breaking the law should steal a loaf to satisfy his hunger, he would be imprisoned, but during that imprisonment fed. Would it not, then, be absurd to support the criminal and allow the pauper

who obeyed the law to starve? The support of the poor, once that their right to support, so qualified, is acknowledged, should not be left to voluntary contributions. These are uncertain, according to the fortune and ability of the benevolent. If they be deficient, starvation ensues. If they be superabundant, they offer a reward to laziness. It would be unjust to leave the support of the poor only to the benevolent, as this would be an exclusive tax upon the best members of society. Besides, under the voluntary system of relief, a just distribution is almost impossible. The most importunate will obtain the greatest quantity of alms, whilst silent poverty will be left unnoticed. In times of famine the support of the poor by private benevolence would be impossible. The principal reason, therefore, for the support of the poor by a rate is, that it is unsafe for society to leave them without bread. Hunger is a foe to social security.

As regards the poor who are too far advanced in life to receive education, no provision should be made for them beyond the necessaries of life, otherwise the poor-rate becomes a provision and a premium for the idle, and industry is taxed for the support of laziness. But unquestionably the children who are on the rates should be educated and taught some trade, in order that they may in after-life be able to support themselves, and that they may not be a burden to the community. If all were well

educated, and possessed of those prudent, industrious, and virtuous habits which a good education engenders, none would be cast on the rates except the aged and infirm.

It has often excited surprise that, with the advance of nations in the wealth, liberty, and general prosperity which compose our modern civilization, poverty at the same time increases, and able-bodied men are unable to support themselves by their labor. The causes of poverty are to be found in the greater amount of labor required as society advances in civilization. Labor increases in intensity with the progress of society. The same amount of labor which in an imperfectly organized and thinly inhabited community would be sufficient to maintain a person in tolerable comfort, will, in a more advanced community, scarcely keep him from starvation. The further that the community has made industrial progress from the original unproductive habits of the savage, the more does it tax the energies of each individual member, and the less will any one who is indolent, or capable only of the lowest species of labor, be able to keep pace with the march of society. A Hindoo must practice more productive industry than a New Hollander—a Chinese than a Hindoo—a Russian than a Chinese; a merchant in a metropolis must work harder than a merchant in a provincial town, and, generally speaking, the inhabitants of London exercise more skill and

untiring industry, and require to exercise more, than the inhabitants of any other place upon the earth. With the progress of society, a greater amount of a superior kind of labor is required from us. A great number will continually be left behind in the race of social progress, and will be unable to provide themselves with the necessaries of life. The only means of counteracting this downward tendency is by education, which, to speak economically, enables the poor to employ skillful labor, instead of unskilled. A man able to read and write is a more valuable member of society than he who is unable to read and write. Juridical science has discovered the true causes of the evil, and points out the remedy—the industrial education of the people. The education of the poor is a proper subject to be provided by the State out of the public general taxes. Where the population is well instructed, and early trained to moral, peaceable, and virtuous habits, less expense is required for the police regulations of society. The difficulty is to guard against the dangers of educating the masses above the position in life which they are destined to occupy. Still, under certain limitations, the education of the poor may be considered as an auxiliary measure of security.

The duties of government, in return for which the public taxes are paid, are the defense of the country, the administration of justice, and the preservation of order, all which may be included under



the term public protection or security. Taxes are paid in exchange for security. All the taxes paid for the support and maintenance of the executive government, for the purposes of justice, police, the army and navy, and the poor, are all paid in order to obtain security. There are no other purposes for which taxes ought to be raised, except those connected directly with public security. The education of the poor is directly connected with security. But it is at least doubtful whether provision should be made from the public taxes for the education of those who are able to pay for it. No person ought to be supported from the public taxes who does not, by his present services, directly contribute to the public security. Taxes are paid in exchange for security, and ought in rare instances to be applied in any other way. This principle appears very obvious, yet it has been much disregarded. It follows, from this principle, that all applications of the public money, such as loans to capitalists to increase their trade, are improper and mischievous. Some States have lent money to agricultural capitalists for the purposes of drainage, and other similar improvements; other States have lent money to manufacturing capitalists for their business. But all the treasure of government arises only from taxes—taxes levied by constraint upon the community. For a government to take from one portion of its subjects in order to benefit another is merely to do a

certain evil for an uncertain good. Even if the taxes were repaid to the State, still the injustice would continue for the time during which they remained unpaid. But all public loans, grants, and advances have a natural tendency to be jobbed, misemployed, wasted, and stolen. The capital so lent will always be employed upon branches of industry less productive than those toward which it would have naturally directed itself. The very individuals who borrow the government money at a low rate of interest would not employ their own capital similarly, or could not borrow money at the ordinary rate for such investments. Government should not tax its subjects for these purposes, when individuals consulting their own interests will not meddle with them.

All citizens are interested in having public protection for their private property, therefore all are bound to pay taxes to maintain those persons without whom this public protection would not exist. All are interested in having this public protection in proportion to the value of their property. But in levying taxation, the principle should be kept in view that all departments of the public service, which do not come under the head of security, should be made to defray their own expenses. Their accounts should be kept separate, and their cost defrayed, not from the public general taxation, but from the moneys raised in the individual services.

For example, the post-office should defray its own expenses. The rate of postage ought to be lowered whenever the receipts from that source exceed the expenditure, because a tax upon commercial intercourse is an improper source of revenue. All other expenses which do not come under the head of public security, should be defrayed by local rates.

Political Science, cultivated in free countries, has now demonstrated that all taxation should be for the public good, and is justified by necessity alone. Taxes are wages paid by the people to certain of their own number, in exchange for the public services which are necessary to the existence of public liberty and security. It is a very common sophism to say we are burdened with taxes—the country groans beneath the weight of taxes. In most of the old countries of the world the rate of taxation is very high. We pay a great sum for justice and police, but then we have justice and police—the security which they afford us, the time which they save us; and it is very probable that production is neither active nor easy amongst people where each takes the law into his own hands.

For example: in some countries the judges are very indifferently paid, take bribes, and give their decisions according to the will of the highest bidder. The consequence in the second instance is, that the merchants of those countries give little credit, from the great difficulty and uncertainty in

recovering their debts. Thus, trade and commerce are paralyzed. Taxation, therefore, is an incident of society. Public order, public liberty, and public justice are as essential to the complete development of the resources of a country, in the production of wealth, as each of the great agents of production—capital, labor, and the land. No one would till the stubborn earth, or sow it with seed, if he were not certain that the fruit of the harvest would be reaped by himself. The triumphs of mechanical science, used as an agent of production in modern times, would never have existed if the products had not been secured for the benefit of the producer. The gigantic system of credit now prevalent in commercial countries could not have arisen, if the people had not been willing, in the first instance, to remunerate and place in an honorable position those members of their own body who discharge the public functions of justice and order. The natural advantages of soil and climate avail but little, unless use be made of them by the energy, honesty, and ability which are required to lay the foundations of civilization. There are countries where the bread-tree grows spontaneously; where fruits and spices hang upon every shrub; where the larger kinds of corn grow with but little labor. Yet such favored regions, illumined by a cloudless sun, with valleys cooled by mountain streams—every field a garden of variegated flowers, colored with hues unknown to

colder climates—are inhabited by listless savages, who sometimes perish from starvation. These magnificent regions are uncultivated and savage, because they never have been inhabited by an energetic and laborious race, capable of originating free institutions. Whilst knowledge, capital, and industrious labor, fostered by security, raised Venice and Holland from the seas, and made them both the seats of flourishing communities, powerful in government and war, the barren wolds of Lancashire have been changed into mines of prosperous wealth worth all Golconda or Peru—to show us that of all the gifts with which the earth has been blessed, and those who inhabit it, the greatest is that untiring energy with which man works where there is complete security for the fruits of industry.

Adam Smith has laid down the four following maxims on taxation, and since they were published they have received the concurrence of every sound writer on Jurisprudence.

The subjects of every State ought to contribute to the support of the government as nearly as possible in proportion to their respective abilities—that is, in proportion to the revenue which they respectively enjoy under the protection of the State. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective inter-

ests in the estate. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation. Every tax, it must be observed, once for all, which falls finally upon one only of the three sorts of revenues—namely, *rent*, *profit*, and *wages*, from one or other of which the private revenue of all individuals must be derived—is necessarily unequal, in so far as it does not affect the other two.

The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person. Where it is otherwise, every person subject to the tax is put more or less in the power of the tax-gatherer, who can either aggravate the tax upon any obnoxious contributor, or extort, by the terror of such aggravation, some present or perquisite for himself. The uncertainty of taxation encourages the insolence of tax-gatherers, the corruption of an order of men who are naturally unpopular—even where they are neither insolent nor corrupt. The certainty of what each individual ought to pay is, in taxation, a matter of so great importance that a very considerable degree of inequality, it appears from the experience of all nations, is not nearly so great an evil as a very small degree of uncertainty.

Every tax ought to be levied at the time or in the

manner in which it is most likely to be convenient for the contributor to pay it.

Every tax ought to be contrived so as both to take out and keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the State. A tax may either take out or keep out of the pockets of the people a great deal more than it brings into the public treasury, in the following way: 1st. The levying of it may require a great number of officers, whose salaries may eat up the greater part of the produce of the tax, and whose perquisites may impose another additional burden on the people. 2d. It may obstruct the industry of the people, and discourage them from applying to certain branches of business which might give maintenance and employment to great multitudes. While it obliges the people to pay, it may thus diminish or destroy some of the funds which might enable them more easily to do so. 3d. By the forfeitures and other penalties which those unfortunate individuals incur who attempt unsuccessfully to evade the tax, it may frequently ruin them, and thereby put an end to the benefit which the community might have received from the employment of their capital. An injudicious tax offers a great temptation to smuggling; but the penalties of smuggling must rise in proportion to the temptation. The law, contrary to all the ordinary principles of justice, first creates the tempt-

tation, and then punishes those who yield to it ; and it commonly enhances the punishment, too, in proportion to the very circumstances which ought certainly to alleviate it—the temptation to commit the crime. 4th. By subjecting the people to the frequent visits and the odious examination of the tax-gatherers, it may expose them to much unnecessary trouble, vexation, and oppression ; and though vexation is not, strictly speaking, expense, it is certainly equivalent to the expense at which every man would be willing to redeem himself from it.

Thus, the fundamental maxims on the subject of taxation are : First, that the subjects of a State should pay taxes according to their ability ; secondly, that the tax should be certain, not arbitrary ; thirdly, the tax ought to be levied at a convenient time and in a convenient manner ; fourthly, the tax ought to be collected at the cheapest rate.

These true principles of taxation are gradually being adopted in Western Europe. And the statesmen of North America have been even more successful in their adaptation.

#### TAXES ON JUSTICE.

Taxes on justice are unjust and indefensible upon the sound principles of juridical science.

The duty of protecting property by means of just laws, promptly, uniformly, and impartially admin-



istered, is one of the strongest and most interesting of obligations on the part of government. Mr. Hume looked upon the whole apparatus of government as having ultimately no other object but the distribution of justice. Lord Brougham has graphically expressed the same idea, when he said that the end of the whole paraphernalia of king, lords, commons, army, and navy, was to place twelve honest men in a jury-box. The passion to acquire property is incessantly busy and active. Every man is striving to better his condition. Constant struggles and jealous collisions take place between men of property and no property—the one to acquire, the other to preserve; and between debtor and creditor—the one to exact, the other to postpone payment. We pay taxes in return for the security afforded by government to our properties and liberties. We ought not to discourage by a tax the very means by which an injured subject seeks redress from the laws of the realm.

It was perhaps natural, in the early stages of society, that the sovereign of a petty State should receive fees from his subjects upon the arbitration of their private disputes. His revenue derived from his private lands, or from tributary exactions, was not sufficient to pay the expenses of judicature, in addition to the other expenses of government. Even if it were sufficient, the imposition of judicial fees upon suitors was an easy method of

raising additional taxes. Thus, the plan of imposing taxes upon suitors who wished the decision of the authorized Courts of Law upon their private disputes, was originally adopted by every State. The judges, in every country, were originally paid by fees exclusively. The judges accordingly derived an additional source of income from the business in their Courts, and were thus interested in the abundance and protraction of litigation. The judges are now paid in most countries by fixed salaries. However, some of the expenses of justice are still defrayed by suitors. This should not continue. Courts of Justice should be provided at the general expense of the country, in the same way as the army and navy are paid for, out of the public general taxation. And suitors ought not to be compelled to undergo any expense, except that which is naturally incurred by providing legal assistance in order to conduct the particular case. In effect, a tax upon the administration of justice is a direct reward offered for injustice. It is inconsistent that the same legislators should at the same time give rewards for informers and impose taxes on justice. By giving the bounty, they acknowledge that it is right to encourage persons to come forward, and to further the ends of justice; by imposing the tax they throw difficulties in the way of the legal redress for wrongs. It was natural that, in early times, the expenses of justice should be defrayed

by suitors. To those rude reasoners it appeared certain that he who obtained a judgment in his favor reaped the principal advantage to be obtained, and, therefore, that it was but right he should bear the expense incurred. But the parties who are compelled to have recourse to legal process, in order to obtain redress for their wrongs, are precisely those who have obtained least benefit from the general law of the realm. They, at the expense of time, care, and money, have purchased that protection which others enjoy, only paying the ordinary amount of taxation.

Another objection to taxes on law proceedings is, that they fall upon a man at the period of his distress. At the very moment when something of a man's property is taken from him, and he applies for redress to the public law of the State whereof he is a subject, this is the time chosen to call on him for an additional contribution to the support of the State. To the poor, this often effects a denial of justice. But public justice is a part of the general system of public protection, which governments in civilized societies afford in return for the taxes which they receive from the people. By the system of Courts of Law, that is, the public arbitration of private disputes, and supported in the last resort by the military power, the rights of all are protected. By a contested case at great cost, a doubtful right is decided. And the decision assists in protecting the

rights and liberties of all. Therefore, the parties who suffer some injury to their rights ought not to defray the expense of the public justice by which they are redressed. They are the persons least benefited by the law and its administration. The protection which the law affords them is not complete, since they have been obliged to resort to a Court of Justice to execute their rights and maintain their rights against infringement, whilst the remainder of the public have enjoyed the immunity from injury conferred by the law and its tribunals, without the inconveniences of an appeal to them. A precisely parallel case is aggression by a foreign State upon part of our community, and a war in consequence for their redress, and to protect them from further molestation. The parties aggrieved are not compelled to pay the expense of the war. In fact, if it were possible to have private rights settled entirely at the public expense, it would be desirable. But this is impossible; for those whose business it is to manage legal proceedings could never be expected to have the same zeal in individual cases if they were paid public officers, and assigned accordingly. The best system of providing for the expense of public justice appears to be, that the public machinery of the law should be paid for entirely out of the public treasury, whilst suitors should be put to no expense, beyond what the advocacy of their individual cases may demand.

The subject of law taxes may be concluded by a quotation from Bentham: "The statesman who contributes to put justice out of reach—the financier who comes into the house with a law-tax in his hand—is an accessory after the fact to every crime: every villain may hail him brother; every neighbor may boast of him as an accomplice. To apply this to intentions would be calumny and extravagance; but as far as consequences only are concerned, clear of criminal consciousness, it is incontrovertible and naked truth."

#### DUTIES OF GOVERNMENT—EDUCATION.

Much discussion has arisen as to the encouragement of art, science, and education, by endowments from the public moneys. The primary object of government is security; but the question arises, Is it advisable for a powerful and wealthy community to make public provision for other purposes?

The education of the poor by the State, under certain limitations, is a measure of security, and for the poor education should be gratuitous. Places of public amusement, museums, parks, and picture galleries, open to the public—even these may be considered as auxiliary measures of security, inasmuch as they refine the public taste, create more wide and generous judgments, unfold more ennobling pleasures.

The craving for excitement and recreation is natural to us. The wearied and depressed spirits of those who live the crowded life of laborious cities must in some way be refreshed. When daily labor is performed, when the claims of social duty are fulfilled, moderate and timely amusement claims its place as a want inherent in our nature. The rich have a thousand ways of gratifying this natural desire for excitement and relaxation. In England and Ireland the poor have almost but one—intoxication by the drinking of ardent spirits. It is right to strive to rescue the poor from this dominion of the groveling and the vile; to give them some idea of the grand achievements of antiquity, the magnificent efforts of the human race, the beauty of nature and art. But institutions such as I have alluded to can be supported on a large scale only by public taxation. To make, also, the education of the people with certainty a measure of security, they ought to be instructed in the principles of law and Political Science. Under the title of law, the children of the people should be instructed as to the criminality and penal nature of the most prominent offenses. It has been remarked that crimes against the person occur more frequently in some districts than others. This is to be attributed not merely to a degree of greater barbarity, but also to a greater ignorance of the law. The danger now to be apprehended from the Socialist sects through Europe arises from the

prevalent ignorance of history, of the true nature of man, and of correct political principles.

The universities of England have been gorgeously endowed, and the middle classes of society principally enjoy their benefits. The magnificent educational charities in England ennoble the country and character of Englishmen. We may reckon these amongst the public endowments for education, although many, if not most of them, are of private foundation. They arose from 'fortunes' acquired in trade and bequeathed by public citizens, with that desire to do good, that noble liberality and zeal for knowledge, which form some of the most prominent and best features in the English character. Of late years, vast sums are annually voted by Parliament for the purposes of national education.

But the question arises, Should colleges and universities be provided out of the public general taxation, to educate those of the middle and upper classes who may be able to avail themselves of them? Adam Smith entertained a very strong opinion upon the subject. He considered such endowments most injurious to the cause of science and education. He considered that if a man's emoluments be precisely the same, whether he does or does not perform some very laborious duty, it is his interest either to neglect it altogether or perform it in a careless and slovenly manner; and that were there no public institutions for education, no system nor

science could be taught for which there was not some demand. A private teacher could never find his account in teaching either an exploded and antiquated system of a science acknowledged to be useful, or a science universally believed to be a mere useless and pedantic heap of sophistry and nonsense. Such systems, such sciences, can subsist nowhere but in these incorporated societies for education, whose prosperity and revenue are, in a great measure, independent of their reputation, and altogether independent of their industry.

Such have been the views of this first of economists upon this important subject. I have given his words—they are worthy of the gravest consideration. These are among the most serious dangers against which universities have to guard. Adam Smith argues not merely that it is wrong to tax one part of the community for the sake of endeavoring to give a higher class of knowledge to the other, but that these endowments are positively injurious to science and education. Can this be true? Does independent wealth destroy the desire for knowledge and the zeal to communicate it to others? And is that poverty which we have learned to mourn as the wretched companion of laborious genius, absolutely then the condition by which that genius is forced to labor? In most numerous instances it certainly has happened that apparently the most triumphant success in a college career has



been the ruin of the fortunate individual, in every point of view except his material comfort. High and varied talent and strenuous industry have often found in these old universities a sudden grave by obtaining a comfortable and idle competency!

And yet few things are greater than a well-conducted national university, wherever it is to be found, or such, at least, as one might be made. A national university—at the same time flinging open its gates to all—embracing amongst its professors the matured intellect of the nation, affording the soundest instruction in the varied branches of that social education becoming a gentleman, and employing that special discipline necessary for individual professions—cultivating art, elucidating antiquity, instructing the youth of a nation in the practice of its laws, and with funds for the assistance of penniless young men to educate themselves for the professions of their choice—this is one of the noblest institutions of civilization.

Can it be said to be injurious for the nation to continue the primary instruction given to the poor up to the highest order—to rescue from the drudgery of manual labor the intellects which occasionally appear amongst that peasantry which has produced such men as Arkwright and Robert Burns? National education may be understood thus: one grand system of public instruction, given and regulated by the State, commencing from the village

school, and proceeding step by step to the college—higher still to the institute—to the university—the gates of science opened wide to all the talents—no parish without a school, no town without a college, no city without a faculty—one great net-work of intellectual studia, lycea, gymnasias, colleges, chairs, libraries, mingling the radiance of their knowledge over the surface of the country—everywhere arousing capacities and animating vocations; in a word, the ladder of human knowledge, held firmly by the hand of the State, placed in darkness the most obscure, and ending in the light. Such a system may yet exist. It does not now.

A university has two functions: one to be a center for educated intellectual men, to pursue together the investigations of science; the other as a place for superior education, whether general or professional. The success which has attended the old universities of Europe has arisen principally from their discharging the first function. A college has no magical power to make scholars. The education given by endowed teachers, wholly independent of their pupils, never has been, and never can be, so successful as where a teacher is paid directly for the work which he does. That the portion of collegiate endowments applied for this first purpose has been well-spent money, the names of Sir William Blackstone, Adam Smith, Judge Story, Chancellor Kent, Guizot, Niebuhr, and Savigny prove—all lecturers in

colleges, and who, by their genius and research, have advanced to the highest degree of excellence the subjects which they taught. Therefore, taxation for the first purpose is right, as a homage to science and art; and in order to provide their votaries with the means, untrammelled by worldly care, to follow their favorite pursuits. But taxation of the entire community for the education of some of the upper and middle classes, through means of universities, cannot be justified with certainty. Still, incidental to the first function of a university is a certain proportion of education. Unquestionably, in most branches of science, teaching improves the teacher.

The entire question is one of the greatest difficulty, and not to be settled until a very distant period. In the meantime, vast endowments at present exist for the purpose of giving superior education. And it is our duty to render them as available as possible to satisfy the wants of the age, and to aid the progress of society.

Education is spreading through the masses of the people, to prepare them for the social changes that ensue in the progress of society. We are advancing in our social phases from system to system, ever nearer to the truths of Political Science. We move slowly; but there is nothing of which we ought to be so convinced as the slowness of progress. In the scheme of the universe, centuries are but seconds—ages produce the diamond. How long did the

granite and marble slumber in darkness, from the time they were fused in the primeval earth until the time when the artist's skill wrought them into the Temple of Theseus, the Parthenon, the Colosseum, St. Peter's! So those who, in the civilized countries of the world, now cultivate the Social Sciences, are forming the materials from which some future statesman shall rear a social fabric, more enlightened, more equal, more just, better fitted for the progress of the civilized world.

It is true that, in this great age of discoveries, of events, of conquests, of freedom, progress is moving at an accelerated pace. In all the free civilized countries of the world, merit, unaided by birth or fortune, can now force its way to the very highest positions. Behold what a future of glory, thought, intelligence, this principle has unfolded! "A high ambition entertained independently of social station, expansion and boldness in political thought; desire for intervention in the affairs of the realm; full of consciousness of the dignity of man as a human being, and of the extent of his power, if he have capacity to exercise it—these are sentiments and dispositions altogether modern, the proceeds of modern civilization, and the fruits of that glorious and elastic generality which characterizes it."<sup>1</sup> The exertions formerly made only by privileged races or classes are now participated by all. The entire

<sup>1</sup> Guizot's "History of Civilization," Lecture VII.

community, instead of a small section only, works for advancement. And, in consequence, the human race has within the last two centuries accomplished more material prosperity than in all the former ages. At the same time, we may be assured what a grand career is yet before mankind, when we reflect how minute a portion of the earth is occupied by free civilized men. We are but in the infancy of civilization. To continue this glorious progress the first requisite is social order—security.

## DIVISIONS OF JURISPRUDENCE.

Rights and duties arise between different States or their subjects, and form the province of International Law.

International Law is the rule which civilized independent societies observe toward one another in modern times. So far as it is capable of being enforced, it comes within the province of Positive Law. The term “international” is of recent origin. Dr. Zouch, in 1650, first distinguished *jus inter gentes* from the Roman *jus gentium*. D’Aguesseau, in 1757, distinguished *le droit entre les nations* from *le droit de nations*. Finally, Bentham, about the year 1790, invented the term “international.”

A great portion of what is called International Law cannot be yet said to come under the denomi-

nation of Positive Law; and Political Law is in the same defective condition as International Law. No punishment can be assigned for the offenses of the sovereign. *Quis custodiet ipsos custodes?* All that human wisdom has been able to devise is a system of precautions and indirect means, rather than a system of legislation. A treaty between two nations is an obligation which does not possess the same force as a contract between two individuals; and the organization of International Law remains most incomplete. In this department of the Science of Jurisprudence there is a great desideratum. The complete recognition of this branch of Jurisprudence will not take place until some international code be adopted by the principal civilized nations, promulgated by their authority, expounded by their international tribunals, and enforced by their combined strength in the last resort.

The security of the civilized nations of the human race would be fixed, so far as it depends on law, if it were possible now to raise Political and International Laws to the rank of complete and organized sciences.

In accordance with the fourfold division of Positive Law, I divide Jurisprudence into four parts, termed, respectively, Civil, Criminal, Political, and International.

Civil Jurisprudence is concerned with those rights which are sufficiently protected by enforcing

performance, or by awarding compensation to the injured party upon any infringement of them. This performance or compensation is enforced by civil process.

Criminal Jurisprudence punishes the violation of a right on behalf of the community, in many cases where no compensation can be awarded. This punishment is effected by criminal process.

Political Jurisprudence embraces the province of government, and its relations to the people.

International Jurisprudence is separated into two divisions, public and private.

Public International Law defines and adjusts the mutual rights and duties of the governments of different States.

Private International Law defines and adjusts the mutual rights and duties of individual citizens in different States. Within the sphere of International Law are included the greatest social and political problems of the age, amongst them the right of intervention, the liberty of the individual, his independence of his own government, and his right to call for protection against wrong.

In point of expression, the whole body of the Positive Law of a State has been usually divided into Common and Statute, or unwritten and written.

The Common Law is the collection of rules of civil conduct recognized by the members of the com-

munity without any positive interference of the legislative power.

The Statute Law is the law prescribed and promulgated in writing by the supreme power of the State.

The object of a statute is to fix the nature of a legal relation, by which the existence of that legal relation may be secured against error or caprice.

Both Common and Statute Law fall under the denomination of Positive Law. They both spring from the same authoritative force—the will of the community. And custom is the sign by which we recognize that Common Law which arises and grows amongst a people as naturally and necessarily as their language.

The Common Law has been called unwritten law, *lex non scripta*—because, without any interference of a legislative body, it is a rule prescribed by the common consent and agreement of the community, as applicable to its different relations, and as capable of preserving the peace, good order, and harmony of society—rendering to every man that which of right belongs to him.

The Common Law is not the production of the brain of one legislator, it is the growth of time and circumstance, the offspring of the necessities which the manners, religion, and circumstances of a nation have imposed. Antecedent to all law enacted by the supreme legislative power—antecedent to the



existence of the legislative body in a State—its inhabitants are governed by customs, spontaneously arising, and binding by the force of common opinion. These ancient customs of the people must be recognized by the judges, as much as the general expression of their will through their representatives in the legislature, and must, equally with the statutes of a realm, be considered as Positive Law.

The sources of the Common Law are in the usages, habits, manners, and customs of a people. Every nation must of necessity have its Common Law, and such law will be simple or complicated in its details, according as the society is simple or complicated in its relations. Some practical rules suffice a wandering horde of savages; laws minute and nice in detail are demanded by the exigencies of a nation which agriculture and commerce have enriched, which civilization and the liberal arts have polished. The Common Law, therefore, is never stationary, but is modified and extended by analogy, construction, and custom, so as to embrace the new relations which spring from a change in the society. In modern times, the new principles which are argued by advocates and determined by judges, are principles of the Common Law, although they are not found in the old books. They are held to be immutable principles, which have slumbered in their repositories, because the occasion which called for their exposition has not arisen.

The Common Law system of England, as administered by the judges of the land, consists in applying to new combinations of circumstances those rules of law which are derived from legal principles and judicial precedents. For the sake of attaining uniformity, consistency, and certainty, those rules must be applied by the judges to all cases which arise where they are not plainly unreasonable and inconvenient. And the judges are not at liberty to reject them, and to abandon all analogy to them in those cases to which such rules have not yet been judicially applied, because the expounders of the law may consider that the rules are not so convenient and reasonable as those which they themselves could have devised.

It was important, under the early feudal governments, that the judges should have been strictly tied up by precedent; but in the present day, in a free country such as England, with judges of the independence and integrity attained in modern times in England—with the publicity of justice, and the liberty of the press as security against corruption—it does not seem necessary that the judges should be so bound by the ancient strict rules of precedent, many of which might usefully be relaxed in the progress of society.

In the English phraseology another division of law is into Common Law and Equity.

Equity is defined as the correction of strict law

wherever it is deficient owing to its universality. This definition has been adopted by Grotius and Puffendorf. Grotius says: Equity is properly and simply a virtue of the will, corrective of that wherein the law is deficient on account of its universality. That is equitable by which the law is corrected. *Proprie vero et singulariter æquitas est virtus voluntatis, correctrix ejus, quo lex propter universalitatem deficit. Æquum id est quo lex corrigitur.* Thus, that species of law which may be termed unwritten, in the sense of not enacted by legislative authority, and which in England is called Equity, is at first wholly distinct from the Common Law, or that part of the immemorial and recognized custom of the realm which is *stricti juris*; and is always distinct from the Statute Law, except so far as the Statute Law in the progress of society professes to regulate the equitable jurisdiction. In its redress of the evils flowing from an unbending adherence to the rules of Common Law, Equity may be termed, according to Schlegel's definition, the law qualified by historical circumstances. In respect to the Statute Law, the necessity for the application of Equity happens either against the design and inclination of the lawgiver, or with his consent. In the former case, particular facts may have escaped his knowledge, or facts may arise in the progress of society requiring a less strict application of the law's unbending rule. In the latter

case, the legislator may be aware of all the facts; but from their number and complexity may be unable or unwilling to recite and provide for them. Cases admit of infinite varieties of circumstances: the law must be conceived in general terms. So Mr. Charles Butler has said that Equity, as distinguished from Law, arises from the inability of human foresight to establish any rule which, however salutary in general, is not, in some particular cases, evidently unjust and oppressive. And in this he has followed the Digest. Neither laws nor decrees of the senate can be so written that all cases may be embraced wherever and whenever they may happen: but it is sufficient that those be included which most frequently occur. *Neque leges neque senatûs consulta ita scribi possunt ut omnes casus quæ quandoque inciderint, comprehendantur: sed sufficit ea quæ plerumque accidunt contineri.*

The method of administering law in the early history of every people is technical. The system of pleading in the ancient Roman Law, the system of Common Law pleading in England, the formalities of written instruments required by statutes—all have frequently had the result of deciding cases, not upon the real merits, but upon the most technical subtleties. Judges in the early stages of law in all countries are unable to decide upon conflicting evidence according to what is true and just: they endeavor to attain certainty. But in the prog-

ress of society the method of administering justice ceases to be technical, and endeavors to be equitable. Thus, in the history of the ancient Roman Law, the technical system was finally suppressed, and the equitable jurisdiction of the prætor became paramount.

But the technical meaning of Equity, as used in the English Courts of Law, is different from that meaning which has been employed by moralists and jurists. Equity, as understood by English lawyers, is that portion of remedial justice which is exclusively administered by the Court of Chancery as contradistinguished from that portion of remedial justice which is exclusively administered by the Courts of Common Law. The Courts of Common Law in England are Courts of Limited Jurisdiction, able to give relief only in certain prescribed forms of action, to which the party must resort to give him a remedy; and if there be no prescribed form to reach the case, he is at law remediless. But the forms in the Courts of Equity are flexible, and their decrees can be adjusted to all the varieties of circumstances which may arise. Thus, the Courts of Equity have had a twofold function: they have relieved against the rigor of the Common Law Courts, as, for example, in the cases which they have held to be not within the spirit, though within the letter, of the Statute of Frauds. And they have also administered justice where it was impos-

sible for the Common Law Courts so to do by reason of their limited jurisdiction and defective machinery. The most precise definition of a Court of Equity, as understood in England, Ireland, and the United States, is, that it is a Court having jurisdiction in the case of rights recognized and protected by the Positive Law of the country, where a plain, adequate, and complete remedy cannot be had in the Courts of Common Law.

#### CODIFICATION.

Historically, Law thus arises amongst a people. First, the Common Law, like their language, springs from their common consciousness. That primitive customary law is antecedent to all formal legislation. Next, the Statute Law in its origin in every State embraces public law and defines the constitution. In the development of society, law becomes twofold. Its primitive fundamental principles still continue to live in the common consciousness of the people. Its more accurate formation and application to particular cases become the particular vocation of the class of lawyers. Finally, the Statute Law is busied with details. It corrects the errors and supplies the deficiencies of the Common Law in private matters.

In the last stage of legislation in a State, the principle of Codification appears. It appears to be a natural law that whilst a nation is rapidly pro-

gressing in wealth, knowledge, and civilization, it is impossible to codify the laws. Whilst the necessary preparation for a digest is taking place, already has the natural progress outstripped the legislators. When a complete code of laws is possible for a nation, its progress must have been arrested ; it must already have reached that maturity in which further development becomes difficult if not impossible. Historical examples are the Code Justinian and the Code Napoléon. From the consolidation of the Roman Law under Justinian, the development of the Roman Law ceased : the development of the Roman civilization had already ceased. France for some time has appeared stationary in wealth and population.

Codification is attended with many dangers. There is the risk of error in definitions. There is the risk of perpetuity being given to those errors by the legislative enactment, so as to preclude their correction upon discovery, as under the present mode of administering the Common Law in England. Definitions in a statute may be useful, when they contain a command or a prohibition, when their object is to determine acts which individuals are bound to perform, or to abstain from ; but when they have no other object than to make known the nature of things, they are useless and dangerous, and should be left to science. In Codification, there is also the danger of cramping the development of the

scientific principles of the Common Law, and of retarding the adoption of advanced rules of justice more consistent with the public welfare and the progress of society.

It is impossible to codify the laws of a nation in such a manner as that no change will be necessary. The rights of the different classes of society are continually changing, and the narrowness of human wisdom cannot foresee the cases which time discloses.

Nor does the conversion of Common Law into Statute Law render it absolutely certain. It is still exposed to the risks of ambiguous construction, arising from the natural imperfection of language as the representative of thought, and from the imperfect use of language.

But by arrangement and classification the disadvantages of the accumulations of books and the judgments of the Courts may be diminished.

The Statute Law may be improved by a more scientific method of enactment and the skillful use of appropriate language. The carelessness of former legislation may be remedied by a strict definition of terms, and by a strict adherence to the judicial phraseology as having a fixed and generally recognized if not technical meaning.

The wants of society are so varied, the communication of men so active, their interest so multiplied, and their relations so extended, that it is impossible



for the legislator to foresee all. In the materials which particularly fix his attention, there is a crowd of details which escape him, or which are too contradictory or fleeting to become the object of a legal test. It is impossible to chain the action of time, to oppose the course of events, or prevent the insensible change of manners. It is impossible to calculate in advance what experience alone can reveal. A code, however complete it may appear, is no sooner finished than a thousand unexpected questions present themselves to the magistrate. Laws once digested remain as they have been written. Men, on the contrary, never repose—they always act; and this movement which never stops, and the effects of which are differently modified by different circumstances, produce at each instant some new combination, some new fact, some new result. Many things are then necessarily abandoned to the empire of custom, to the discussion of learned men, and to the arbitrament of the judges. The duty of the law is to fix, with enlarged views, the general maxims of right, to establish principles fertile in their consequences, and not to descend into the detail of the questions which may arise upon each matter. It is for the magistrate and the lawyer, penetrated with the spirit of the laws, to direct the application of them. Hence, amongst all polished nations, in addition to the laws made by the legislature, a number of maxims, decisions, and doctrines

is daily promulgated by practice and by judicial duties. The professors of the law are reproached with having multiplied subtleties, compilations, and commentaries. This reproach may be well founded. But what art, what science, does not deserve it? Must a particular class of men be accused of what is only the general tendency of the human mind? There are times when we are condemned to ignorance because we have not books; there are others where instruction is difficult because we have too many. Excess in commentary, discussion, and authorship is to be pardoned above all in Jurisprudence. We cannot hesitate to believe this if we reflect on the innumerable ties which bind citizens. There is a constant development and a successive progression of the objects with which the magistrate and the jurisconsult are obliged to busy themselves. The course of events modifies in a thousand ways the social relations. He who blames subtleties and commentaries becomes, in an individual cause, the subtle, fastidious commentator. It would be without doubt desirable that all matters should be regulated by laws. But in default of a precise text on each matter, an ancient usage, constant and well established, an uninterrupted current of similar decisions, an opinion or a received maxim, holds the place of law. When we are directed by nothing that is established or known, when we treat of an

absolutely novel fact, we ascend to the principles of natural justice.

Bentham enumerates four conditions which ought to belong to a code of laws, and which ought to be regarded in its division.

The first condition of the code should be the greatest happiness of the greatest number.

It should have for its end the general interest ; and if this condition has been satisfied in the political code, that is, in the code which establishes the different powers of the State, it will be easy to follow it up in all the other branches of legislation.

The second condition is *integrality* ; that is to say, it ought to be complete, or, in other words, embrace all the legal obligations to which a citizen should be subjected.

The third condition is imperfectly expressed by the word *method*. Bentham means by this, not only precision of language and clearness of style, but such an arrangement as would allow all those interested in it easily to acquire a knowledge of the law. All that is included under this comprehensive head is expressed by the word *cognoscibility* ; that is to say, the law should have a great *aptitude to be known*.

There is no one word which can express the fourth condition to be satisfied by a body of laws. The meaning must be conveyed by a periphrasis. Each law should be accompanied by a commentary

or exposition of the grounds on which the law is founded, showing what relation it bears to general utility. This commentary is, as it were, a justification of the law; *justifiability* of the law would, perhaps, be the proper word to express this characteristic of good laws, since those only are good for which we can give good reasons.

A code of laws is like a vast forest: the more it is divided the better it is known.

The first principle of division in a code consists in separating laws of universal interest from those of special or individual interest.

There are some laws with which every man should always be acquainted, and there are others which are only required on certain occasions; in other words, there are laws of a permanent, and others of a temporary and occasional interest.

The penal code is the first in importance; all human actions which are the object of law are necessarily included in it. What is called the civil law is only a collection of explanations, or, in other words, an exposition of what is contained in the penal code. Thus, the penal code prohibits from taking an article of property to which the taker has no right: the civil code explains the different circumstances which give such right, or make anything property. The penal code forbids adultery: the civil treats of all that concerns the mar-

riage state, and the reciprocal obligations of man and wife.

The true method of Codification is from time to time to select individual portions of the law, and to digest and arrange such portions in scientific order.

#### THE STUDY OF JURISPRUDENCE.

The development of Jurisprudence has arisen in two ways—from the individual labors of learned men, and from the natural progress of society. Thus, one important branch of law has sprung, in modern times, from the necessities of commercial intercourse. International Law is entirely the offspring of modern civilization, and is the latest important discovery in Political Science. Communities which anciently admitted of no political superior upon the earth—no law to guide them in their intercourse with foreigners except the dictates of capricious ambition—are now willing to regard themselves as subject to certain rules, the observance of which is expedient for the interests of all. In ancient times International Law had no existence. But from the number of civilized States in modern Europe—of nearly equal power, of similar political and ecclesiastical institutions, and united in the friendly ties of commerce—a set of rules has been adopted in diplomatic intercourse and the settlement of international disputes. International Law, however, is only Pos-

itive Law, in so far as it will be supported by an appeal to arms in the last resort. And although the appeal to arms may not be resorted to in every case, yet the fear of incurring general hostility operates upon nations, keeping them within the rules of national comity. The term "law of nations" is used by Vattel to designate the science which teaches the rights subsisting between nations and States, and the obligations correspondent to those rights. The Law of Nations teaches the rule which ought to be observed: International Law is the rule observed. The origin and progress of International Law is in itself a remarkable step in the march of civilization. Nations now begin to acknowledge their subjection to laws in conformity with natural justice and reason, as in the very origin of society individuals acknowledge themselves so bound. And the development of International Law will proceed amongst the civilized nations of the earth until citizens can enjoy, in foreign countries, all the rights which they enjoy in their own. There is no good reason that a malefactor, by changing his domicile, should evade justice. There is no good reason that a debt incurred in one civilized country should not be recovered with the same facilities in all others.

The great desideratum in International Law is a code adopted by the civilized nations of the earth, and to be enforced in their combined strength in the last resort.

The complete development of International Law can only take place from the influence of commerce, which unites the human family by the strongest tie—the desire of supplying mutual wants. Commerce demands an international code for the civilized nations of the earth ; so that the laws of partnership, insurance, bills of exchange, shipping, and bankruptcy may be uniform. Commerce demands that there should be throughout the civilized world a uniform standard of the precious metals, and a uniform system of coinage. Commerce demands a uniform international system of weights and measures. Commerce demands a uniform system of taxation. Commerce demands that debts should be recovered with equal facility in every country, irrespective of the place of contract. Justice demands that over the entire world there should be no asylum for the criminal. Literature demands that the property in its works should be secured by international copyright. Art demands that the property in its inventions should be secured by an international law of patents. If ever there shall exist a common coinage and uniform taxation for the civilized world, with international Courts of Justice whose jurisdiction shall extend over continents, civilization will owe these advantages to the origin and progress of International Law. Then, to use the words of Cicero : There shall not be one law at Rome, another at Athens ; one now, another here-

after ; but one and the same law shall obtain at all places and times. *Non erit alia lex Romæ, alia Athenis ; alia nunc, alia posthac ; sed et apud omnes gentes, et omnia tempora una eademque lex obtinebit.*

The study of Jurisprudence will aid in the most important degree the development of International Law, and will assist the progress of law reform at home. Certainly, if there were ever an age in which it was important for gentlemen to be acquainted with the principles of Jurisprudence, it is the age in which we live. In matters of law and government, *stare super antiquas vias* is no longer held to be the leading maxim. In England, almost the whole legal world is toiling in the paths of law reform. And the labors of other countries are no longer unknown and despised. The feudal system of real property, and many of its attendant institutions, are abolished in some of the seats of the oldest civilizations. Certainly the experiment of agriculture in the hands of freemen, in farms of moderate extent belonging to themselves, is now being tried upon the most extensive scale in Continental Europe. And it is at least worthy of our attention to study on scientific principles these great phenomena, with the view of introducing into the English real property reforms the best portions of the new landed system of modern Europe.

Next to the real property reforms, the new systems



of national education attract our notice. It is from the combination of natural powers that man derives his civilization. Having acquired a certain amount of knowledge, it is partly optional with him whether he will make use of the powers of nature, or obstinately struggle against them. And so, availing themselves of their natural capabilities, some races of superior energy have arrived at a partially developed civilization. But the cultivated energy of human thought shall yet develop greater results. Now, in almost every civilized country, there exists a vast number of paupers, for whom civilization has been in vain, to whom it has scarcely brought any benefit. For offenders, the law provides police, judges, the prison, the scourge, and the gallows. Some States, a little further advanced in social knowledge, try also the effects of national education. They act thus upon the soundest principles of Political Science. In moral and physical nature alike, over the earth, we see the results of cultivation. In physical nature, a large extent of country left as a marsh or swampy forest, in its original rudeness, shelters beasts of prey, herds noxious vermin, and from its baleful precincts spreads pestilence over the adjacent country. Time advances, and with it the steps of civilized man. He fells the trees which kept the sunlight from drying the ground. He drains the marshes, which speedily bear abundant harvests. The wild beasts, deprived of shelter, perish from

the place no longer fit for their habitation ; the dry and cultivated ground no longer breeds fevers and agues. This spectacle, either in its progress or in its fruits, is witnessed over the entire earth. In moral nature we now see the minds of the lowest class in society left stagnant and disfigured by moral pollution and ignorance. As the earth, left to itself, becomes waste and tangled—the pestilential abode of reptiles and wild beasts—so the mind, uncultivated, produces crime and pollution. But in both cases, if we would perform our duty to ourselves and society, we must cultivate ; we must cultivate the savage earth, we must cultivate the ignorant minds of the poor. If we wish the earth to be wholesome and fruitful, it must be drained and cultivated. So, too, with the wholesome crop of knowledge we must banish the bitter thorns of ignorance. If we wish the poor to take their places as citizens in society, we must educate them, and, by means of laws in conformity with natural justice and reason, place the poor in a condition wherein they may use that education, and earn their bread. The teaching of modern Political Science is, that the true way to provide for the general happiness is to give all citizens an interest in the prosperity of the nation, to leave trade and labor free, and to give the humblest a good education. And the countries which have emancipated and given independence and education to the

lower classes, have not only given liberty to them, but security to all.

Political Science is often abused, as not being practical; but it will not be denied that such questions as these are practical.

So also, since the arts of sculpture and painting have been united with manufactures, and aid in their development, it is important to consider on what principle the laws of civilized nations now refuse to the inventor the complete property in his works. Schools of design are endowed and encouraged by patrons of the fine arts. Yet, in the British Islands, the ingenious mechanic, who invents new machinery to cheapen production and facilitate labor; the artist, who with plastic skill designs the most exquisite forms for the furniture of our houses; the painter, who stamps with beauty the plain creations of the loom, and enables Manchester to find a market in China and India—all are by the present laws denied the full property in the works of their hands and brains.

The English law, with its excellent characteristics—trial by jury, *viva voce* evidence, and publicity in every stage of the proceedings—has spread over a vast portion of the earth. In North America, the English law has crossed the Alleghanies and the Rocky Mountains with the emigrants; and on the shores of the Pacific the representative government, the municipal systems, and the Common Law of

England give strength and liberty to nations. So, if we turn to India or Australia, the English lawyers may say :

“*Quæ regio in terris nostri non plena laboris  
Est !*”

The study of Jurisprudence is not merely concerned with the permanent progress of the human race and the amelioration of society. Many believe such ideas to be visionary. But there can be nothing more strictly practical than the consideration of such questions as the legal burdens which press upon the owners and occupiers of land, and prevent its free transfer ; the reasons for the education of the poor, and the best method to accomplish it ; the questions of international copyright, international law of patents, and international commercial code ; and the reform of legal procedure. These things concern the prosperity of the entire community, and it is expedient to consider them upon scientific principles.

Great men in all ages have cultivated Jurisprudence. Most of our modern legal civilization is the result of the labors of those who, from the original rudeness of savage life, have developed the principles of Civil and Political Right. A true social idea never disappears. Once that it has germinated in certain right hearts, sound and logical minds, it bears within itself something vital, divine, immortal, which

never more perishes in its entirety. Passions, interests, ignorances, prejudices, may crush it under foot, may mutilate it under the saber or hatchet; its fruits are retarded for ages: but the hand of Providence is full of ages—at the destined time, the living idea, of which the seed has been spread and multiplied even by the storms, bursts forth at once in the minds of all. The brute matter of human existence is wrought into society only by length of time. A great and free State is the work of many ages, of stupendous characters, of watchful senates, of sages and heroes. To form, support, and bring such to maturity, the invention of nature must be stretched for thousands of years. We reap the fruits of all the political experiments which have cost so much time, care, and misery.

## CHAPTER V.

### HISTORICAL REVIEW.

That art is long and time is short, has been said and sung in many languages.<sup>1</sup> The old saying applies to the study of Jurisprudence more than to any other subject. The general ideas of a science have been reduced to four heads: to determine the particular subjects of the science; to distinguish the sciences which border on it, and to indicate the relations which it has to them; to divide and subdivide the science thus precisely defined; to give an historical sketch of the development of the science. Some of these objects have been attempted in the previous pages.

Socrates, the first citizen of the world, commenced the Political and Ethical Philosophy of Europe. Plato preserved in writing the opinions of Socrates. Aristotle analyzed the divisions of

*"Ο βίος βράχυς ἢ δὲ τέχνη μακρῆ.—Hippocrates.*

*"The life so short, the craft so long to learn."—Chaucer.*

*Ach Gott! die Kunst ist lang,  
Und kurz ist unser Leben.—Goethe.*

*"Art is long and Time is fleeting,  
And our hearts, though stout and brave,  
Still, like muffled drums, are beating  
Funeral marches to the grave."—Longfellow.*

Justice. But despotism and slavery corrupted the Grecian politics.

The ancient Roman Law is displayed to us as a blending of the popular and technical elements which exist in all laws. Cicero combined the characters of the statesman and the lawyer, and his philosophy was used in Christian Ethics by St. Augustine and other fathers of the church. The Civil Law of the Romans is to this day a portion of the legal life of every free citizen in Europe and America. But the consolidation of the law under Justinian shows that the development of the Roman State and people had then ceased forever.

The last conspicuous form of ancient philosophy was that which it assumed at Alexandria. The city chosen by the pupil of Aristotle to bear his name, and to rise to scientific, commercial, and political importance over others, as its founder overcame empires, became the scene of great thinkers and mighty schools. Plotinus resuscitated Plato; Proclus gave the world another Aristotle. The closing of the Athenian schools by Justinian, and the death of Boëthius, may be considered the last events in ancient philosophy. Nothing can be more unfounded than to suppose because Boëthius is usually styled the last of ancient philosophers, and Descartes the first of modern, that therefore, from the sixth to the seventeenth centuries, there had been no philosophical activity. We have too much disre-

garded the philosophy of the so-called Dark Ages. It is usually the least explored, but by no means the least instructive period of European history, as it has been traced in the disquisitions of Montesquieu, Ranke, Hurter, Voight, and Hallam. The feudal and legal systems of Europe arose independently of mere abstract investigations on mind, and of the principles of doctrinal theology. All the most important laws and institutions of European society were dug out of the mine of that ponderous and inexhaustible mass of human speculation. There, even more than among the ancients, may be found the well-springs of our modern speculative doctrines and controversies. In fact, no age in the world's history was more productive of great men. It was the age of William the Norman, of the well-taught Lanfranc, of Abelard, and Bernard of Clairvaux, of the learned Mussulmans of Spain, of Roger Bacon, of Albertus Magnus, of St. Thomas Aquinas, of Duns Scotus, of Alexander Hales, of Occam and of Bradwardinus, of Thomas the Rhymer and of Marco Polo, of Sir William Wallace and Edward the First. It was the age of rising cities, of consolidated feudalism, of literature beginning to breathe, of liberty struggling to be born. It is a universal law of nature that a new organization shall always be preceded by the entire dissolution of what has gone before. The mineral will crystallize anew only after it has been completely dissolved. The



vegetable and the animal must be decomposed before their elements can recombine into other forms of life. So, too, a new society can arise only when the old one has been wholly dissolved, its atoms freed from each other, and its old arrangements broken up, that every particle may be at liberty to become part of the new living frame, according to some other law than that which governed the formation of the old social unit. The Roman world had to be ground down and dissolved by barbarian and Christian influences before the formation of modern society became possible. Then the church set about the task of reorganizing a body of knowledge, of pouring her vivifying and purifying light through all the powers and capacities of thought which were slumbering in the minds of men, so as to arouse them to exercise themselves in the various pursuits of arts and sciences. Philosophy meditated on the deep truths of religion, and endeavored to arrange them in logical order and sequence. An acute and penetrating logic, like the flaming sword of Paradise, turned every way to guard the sanctuary of religious truth.

Upon the fall of the Roman Empire, the study of the Civil Law was abandoned—an age of legal darkness for a time covered Europe. Upon the revival of learning in Europe, the term Jurisprudence was not used to designate that department of mental science which treats of the rules of universal justice.

In its primary sense, the word Jurisprudence was used to denote the knowledge of the Roman Law. The science of law in Europe dates from the twelfth century. It was then associated with theology and scholasticism. Irnerius was the contemporary of Abelard. During four centuries from the year 1100, the Civil Law was zealously cultivated in Italy; and simultaneously the Feudal and Canon Laws acquired a systematic form.

Six centuries after the complete codification of the Roman Law, it began again to be cultivated in Italy. Irnerius, Accursius, and Bartolus represent the schools.

In the sixteenth century, Alciatus and Cujacius established the French school of Civil Law.

Machiavelli, in Political Jurisprudence, accomplished a grander reputation, and founded a school, which, during the sixteenth and part of the seventeenth centuries, had for its dogma the right to use fraud in politics.

Sir Thomas More introduced into politics the spirit of Christianity, which he attested by his martyrdom.

The learned ecclesiastical jurists of the Spanish universities, Vasquez, Victoria, Soto, Suarez, in their laborious treatises on justice, collected the principles of Natural Law and of Politics as enounced by the fathers and schoolmen of the Middle Ages.

Bodin, late in the sixteenth century, appears as the first great antagonist of Machiavelli, and in his "Republic" discusses the divisions of politics and laws.

With the commencement of the seventeenth century, Bacon extends the inductive method from physical to mental and political science. As such, he is the original discoverer of the principles leading to individual liberty.

Grotius treated of the topics of Civil Right in relation to those federal and international relations which yet are imperfectly developed, but which in time will harmonize the powers of the individual governments now exercising authority over the nations of the human race.

But whilst Grotius developed his lofty theories for citizens of the world, Hobbes scientifically analyzed the lowest laws of nature. Through cowardice and fear, the inferior types of man always do their best to injure strangers. In managing the lowest developments of society, the only possible government is a despotism.

In England, during the seventeenth century, Culverwell, Zouch, Selden, Harrington, Sidney, Cumberland, and Locke wrote on the Law of Nature and Nations, or investigated other branches of Civil or Political Right.

Late in the seventeenth century, the German School of Jurisprudence originates with Puffendorf,

is illustrated by Leibnitz, and has lasted in an unbroken chain of professors at the universities down to our own times.

In the eighteenth century, Vico, Beccaria, and Filangieri represent the Italian school, and illustrate the progress of nations, punishment, and legislation. The spirit of laws is discussed by Montesquieu and the encyclopedists. And the series of the French jurists ends with those who framed the Code Napoléon.

The Metaphysics of Law are reviewed by Kant. Some of his definitions are the best in the Science of Jurisprudence.

Bentham and Savigny are amongst the last and greatest writers on Jurisprudence.

Sir Samuel Romilly, Sir James Mackintosh, Sir Robert Peel, and Lord Brougham, in the present century, transferred to English legislation many of the scientific theories of Bentham.

Lord Brougham, by his individual labors, gave a new impulse to the cultivation of the Social Sciences.

Lord Selborne has associated his name with the reconstruction of the judicial system of England. Sir John Duke Coleridge has introduced the most important legal reforms. The leaders of the bar are amongst the most earnest reformers of the law.

The world is coming under the reign of law. The nineteenth century is the era of great nations. The gigantic States of modern times are proofs of increased power of organization, and of more willing obedience to law by the multitudes. The United Kingdom of Great Britain and Ireland, the Empire of Russia, the United States of America, govern larger portions of the world, possess greater wealth, can set more legions in the field or squadrons on the ocean, than the old Roman Empire of the Cæsars in their mightiest days. Russia is now the most conservative State in the world. America is the most democratic State in the world. In human affairs one lesson from history is, that mighty and rapid changes, conducted by violence, produce wars between nations, intestine seditions, and ruin in States. The objects of all governments ought to be, in the first instance, peace, order, and religion, without which peace and order are most difficult to maintain. Enlightened despotism recognizes the rights of man. The Emperor Alexander II has given land and liberty to fifty millions of Russian and Polish peasants. In the history of the world very few men have had the happiness to do so much good to mankind. On a gigantic scale, the Emperor Alexander has done for Russia what Stein and Hardenberg less generously did for the Prussian

peasantry, what Mr. Gladstone, through all the difficulties of representative government, has endeavored to accomplish for Ireland. Just laws, regulating the tenure and distribution of landed property, are the triumph of statesmanship. Great national systems of education under centralized governments are abolishing local dialects, and are aiding the union of mighty nations by the diffusion of the most advanced and noble languages.

The true origin of the rapid greatness and development of Prussia is to be found in the national education of the people and in the emancipation of the land, commenced by Stein in 1807, and by Hardenburg in 1820.

A great portion of Western Europe is now going through a period of anarchy and disorder. After ages of historical ruin, there appear fair prospects of peace and progress in the East. In every respect Eastern Europe is in a rapid state of transition. A vast change is coming over Asia. The railways alone bring a modified civilization. A railway bridge is to cross the Hellespont. Railways into the heart of Asia will rapidly open to the industry and cultivation of Europe districts in Southern Siberia, with soil and climate equal to those of France and Italy, the communication with which is now interrupted by the steppes and deserts where roam the nomad tribes of Turkistan. One of the contemplated lines to India is to run by Tiflis, the Cas-

pian Gates, Teheran, Meshed, Herat, Cabul, and the Khyber Pass, to Peshawur—the route by which Alexander the Great led the Macedonian veterans to the Indus. A line is run from the Caspian Sea to the Persian Gulf. The contemplated Russo-Persian lines will run through districts once the most flourishing on the earth, and whence the “Great King,” the terror of Greece, drew his legions. But these fair regions are now without peace, order, or law; and the great populations and noble cities once existing in Persia and Turkistan have vanished. But Samarcand may soon be a railway station, and the famous city of Timour may be brought under the reign of law.

China and Japan may speedily assume European civilization. The government of Japan has signed concessions for hundreds of miles of railway; and the government foundries in Japan are building locomotives and ironclads. The sons of the nobility and gentry of Japan are coming in numbers to the cities of Europe and America, to learn the languages, the laws, the trades, and manufactures of the most advanced nations. The national colleges of Japan are stated to be adopting the English language. These mighty events, contributing to the harmony of nations, the union of mankind, and the peace of the world, are possible only under the reign of law, resting on the tremendous power of great

States, giving peace to men, and security for life, liberty, and property.

In 1872, by the invitation of the Emperor Alexander II, some of the ablest men in Europe discussed in St. Petersburg many of the intricate questions of international law: an international system of the registration of births, marriages, and deaths; the statistics of international industry and commerce; international sanitary and medical registration; an international system of judicial statistics; an international nomenclature of crimes; an international system of weights and measures for all the nations of the world; an international system of decimal coinage for all the nations of the world. And surely these things, when accomplished, will be amongst the most wonderful works of man. In St. Petersburg the representatives of the United Kingdom and of America met the representatives of every other State in the world at the International Congress of 1872. There, Egypt and Japan aspired to be reckoned amongst the progressive, peaceful, and industrious nations of the world, and Russia gave to all the noblest hospitality.

The gigantic power of Russia can be compared only with the increasing strength of America, or the matured energy of England. In Russia, an enlightened despotism directs the fortunes of eighty millions—a mighty nation—under an aristocracy magnificent in lineage, wealth, diplomacy, arts, and



arms. In America, democracy allows absolute freedom to the individual, and government there is conducted without a landed aristocracy, or a permanent standing army. Under both systems of government, the trade, commerce, manufactures, and agriculture of the people flourish. In the United Kingdom of Great Britain and Ireland, both systems of government are united. As Tacitus says, "*Res olim dissociabiles principatum ac libertatem miscuerunt.*" We have united monarchy with liberty, things once incapable of being united. Let us hope that the three great nations of the world, the United Kingdom of Great Britain and Ireland, the United States of America, and the Empire of Russia, governing, under most different systems of political administration, gigantic masses of mankind, may continue to enjoy their present mutual goodwill and peace—the greatest happiness with which the Almighty can bless the human race.

Several political questions of importance during the present century have prominently agitated the societies in which they have been raised.

Such are the questions of union amongst the races having the same national origin and speaking the same language on the Continent of Europe—the questions of a United Italy, a Germanic Empire, a Panslavonic Confederation or Empire.

The question of international arbitration has excited vast political interest.

The two greatest social events of the latter portion of the nineteenth century are the emancipation of the serfs by the Emperor Alexander II, and the abolition of slavery in the United States of America.

All these questions, decided either by internal or international legislation, accomplish social results. A social result is one that manifests itself in the collective life of societies, or which affects entire categories of individuals.

Other purely legal questions are those which concern the machinery of law. Such are—

Codification.

Reform of the judicial system.

Abolition of taxes on legal procedure.

The reduction of the expenses of justice.

The reduction of the expenses attendant on the transfer of property.

These topics may serve as illustrations of discussion in the elevated regions of political thought.

Largior hic campos æther et lumine vestit  
Purpureo.

THE END.

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